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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 9385

GUY MARIN,

Plaintiff-Appellant,

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a Corporation,

Defendant-Appellee.

461
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Agenda No. 2
Appeal from the
Circuit Court of
Champaign County
Illinois.

323 I.A. 69

RIES: J.:

Plaintiff-Appellant filed a suit at law in the Circuit Court of Champaign County seeking recovery of \$1260 in commissions alleged to be due and payable to him as a duly licensed real estate broker for the fair, usual and customary charge in that county for services performed by Appellant for Appellee in the sale of a 240 acre farm. The lands, comprised of two tracts, were shown to have been sold and conveyed to Lucille B. Christie and John B. Christie as Trustees, etc., for a purchase price of \$41,500. Plaintiff alleged that the sale was made under the terms of a contract of employment of the Plaintiff by the Defendant. The case was tried by a jury and at the close of Plaintiff's evidence, upon motion of Appellee, a directed verdict was returned in favor of the Defendant. Judgment in bar of action and for costs was entered on the verdict against said Plaintiff, from which judgment he has appealed to this Court.

By its answer, the Defendant admitted that Plaintiff was a licensed broker engaged in the business of negotiating sales of real estate for compensation and that the Defendant was the owner of the real estate described in the complaint; denied the employment of Plaintiff to procure a purchaser for said real estate for \$42,000 or any other price or that it agreed to pay him compensation therefor as alleged; denied that Plaintiff had procured such purchaser or con-

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The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1900:

Chairman of the Board	Mr. J. E. Smith
Vice-President	Mr. J. E. Smith
President	Mr. J. E. Smith
Secretary	Mr. J. E. Smith
Treasurer	Mr. J. E. Smith
Committee on Finance	Mr. J. E. Smith
Committee on Operations	Mr. J. E. Smith
Committee on Legislation	Mr. J. E. Smith
Committee on Public Relations	Mr. J. E. Smith
Committee on General Management	Mr. J. E. Smith

summed the sale; denied the alleged indebtedness for any service or for any amounts on account of the sale of the land described in the complaint and admits its refusal to pay Plaintiff compensation or commission thereon. Defendant further avers certain alleged facts concerning the listing of properties including the land in question with the Plaintiff and various other real estate brokers, accompanied by a letter of instructions from its Champaign branch office containing specific terms and conditions upon which offers for the purchase of any such listed farms might be submitted to the Defendant for its consideration. Defendant further averred that the payment of commission or compensation was conditioned upon procurement of a purchaser, acceptance of his offer by Defendant at its home office in New York and subsequent consummation of the sale by a broker with whom such real estate was so listed, as the sole basis for any liability, and expressly denied the procurement of a purchaser or consummation of sale of the listed land in question identified as Farm No. 95 by the Plaintiff in compliance with such terms, and further averred that the sale was made and consummated through other brokers to whom a commission had been paid.

Plaintiff assigns errors by the Trial Court in directing the jury to find the issues for the Defendant; in allowing an oral motion to be made for a directed verdict; in improperly instructing the jury orally instead of in writing; in attempting to weigh the evidence; in considering the evidence produced on cross examination; and asserts that the directed verdict is against the manifest weight of the evidence. No cross-appeal was taken nor ^{were} cross-errors assigned.

In support of its alleged cause of action, the Plaintiff testified in his own behalf and offered the oral testimony of one of the trustee purchasers of the real estate in question, Lucille Christie, and of witness Louis Hardison, Assistant Supervisor of Defendant company in its Champaign office, who was called for cross examination under Section 60 of the Civil Practice Act, (Ch. 110, Sec. 60 Ill. Rev. Stats.) together with thirteen written and printed exhibits offered and admitted

in evidence.

It appears that the Defendant had acquired title by foreclosure proceedings ^{and purchase} to numerous farms in Central Illinois, for the sale of which it had caused printed lists consisting of a number of sheets to be prepared and mailed or delivered to various licensed real estate agents or brokers in that vicinity, including the Plaintiff, which lists included a number of farms in Champaign County. The lists (Ex. 4) set forth descriptive information concerning each farm, including a brief outline of road facilities, nature of soil, character of buildings and electric current, if available. The farms were numbered; the name of the former owner and tenant, if any, was given, the number of acres, whether improved or unimproved, and a recommended sale price. Farm No. 95, listed at \$42,000 was described as the S $\frac{1}{2}$ NW $\frac{1}{4}$; SW $\frac{1}{4}$ Sec. 25-22-7, located 1 mile northwest of Fisher on gravel road. Among other recitals appearing therewith was the following: "This is not to be construed as an offer to sell or as giving to any one the sole right to sell the properties listed. We reserve the right to change without notice the price quoted or sell this land through our own or other agencies. All offers are accepted or declined by the Home Office of the Society. All sales are to be subject to present leases, easements, rights-of-way, and special or improvement taxes and assessments, if any. The above information is submitted solely as our estimates and opinions; no representation of accuracy is hereby made. No commission shall be deemed to be earned, due, owing or payable to any broker until and unless the sale is closed through him and the deed to the purchaser delivered and accepted. All previous listings on above property are superseded hereby." The letter of instructions or terms and conditions of offers to be submitted and commissions payable on negotiated sales, as referred to in the answer, was also among the exhibits. It was stipulated (p. 26 abst.) that 3% of the purchase price was the usual rate of commission paid on sales and that the actual sale price of the land in question was \$41,500. It further appears from the record,

It is requested that the Government and the people of the United States be informed of the results of the investigation conducted by the Commission on the activities of the Communist Party, Inc. and its branches in the United States and abroad. The Commission has the honor to report that it has completed its investigation and has prepared a report which it is submitting to the President of the United States. The report contains a detailed account of the activities of the Communist Party, Inc. and its branches in the United States and abroad, and of the results of the investigation conducted by the Commission. The report also contains a list of the names of the persons who are known to be members of the Communist Party, Inc. and its branches in the United States and abroad. The Commission believes that this information is of great importance to the people of the United States and to the Government, and it is therefore submitting it to the President of the United States for his consideration. The Commission also wishes to express its appreciation to the many persons and organizations who have assisted it in its work.

insufficiently abstracted as ^{to} several of the exhibits, that from time to time the Defendant Society had mailed out nineteen postal cards from various representatives of the Branch Office at 118 N. Neil St., in Champaign, addressed to the Plaintiff, soliciting submission of offers to purchase or making reference to sales, withdrawals or commission payments on one or more of the listed farms, which postal cards appear in the record as Plaintiff's Exhibit 5. Some of the cards contain congratulations on previous sales and recite that "We hope that you will be able to obtain an offer on one of our other farms so that we can recommend a commission for you." Five letters (Exhibits 7 to 11 inc.) from company representatives of the Defendant and two "News letters" (Exs. 6 and 12) which appear among the exhibits were also mailed to Plaintiff from Defendant's branch office in Champaign. Plaintiff had previously sold certain tracts of real estate and collected commission therefor from Defendant. In some instances, 3% commission had been paid; in one instance it had been reduced by agreement and in another, payment had been withheld by consent of Plaintiff. Other than the exhibits herein above referred to, some of which are irrelevant to the issues herein, there appears to have been no further written memoranda or any signed contract as between the parties.

A written bid of \$41,500 signed in triplicate by Lucille B. Christie on company forms dated June 26, 1942, showing written acceptance endorsed thereon by the company on June 30, 1942, was admitted as Plaintiff's Exhibit 13. Deeds of conveyance to said farm (Exs. 1 and 2) from the Defendant to the purchasers, Lucille B. Christie and John B. Christie, Trustees, so designated in the signed offer of Lucille B. Christie, were delivered by the company and accepted by the purchasers on July 6, 1942. The evidence further tended to show that subsequent to receipt of the above printed list, (Ex. 4) the Plaintiff showed certain of the listed farms to prospective purchasers, including the farm in question and other of Defendant's farms to Lucille B. Christie and that he quoted the listed price thereof to her;

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that he twice drove her around to view the farm but not upon the farm in his automobile and pointed out to her the alleged advantage of its location, price and ownership and solicited an offer which she said she would make later if they liked it; that he had several phone conversations with her before and after showing her the farm; that she had objected to its purchase because of a drainage ditch across the land; that he went to the offices of the Defendant Society in Champaign and there told one or more of the company representatives, viz: Haines, Hardison and Maxwell, that he had been in communication with said prospective purchaser as a likely buyer for the farm. It appears that the above transactions and negotiations occurred at various intervals between October, 1941 and the occasion when ^{plaintiff} learned that the farm had ^{been} sold. Subsequent to the time of Plaintiff's negotiations with her, a company fieldman named Hubbard came to her home on June 26, 1942, when and where she signed one of the regular company forms containing the written offer to purchase the farm for \$41,500, which offer was forwarded and accepted and the transaction completed as above set forth.

Since the decision herein must be determined upon the motion for a directed verdict, we find it necessary to summarize in greater detail the testimony offered in behalf of the Plaintiff; some of which, however, was incompetent or elicited by cross examination as to irrelevant matters beyond the scope of the direct examination or immaterial to the issues herein.

The substance of Plaintiff Guy W. Martin's testimony concerning matters material to the issues was as follows: That he is and was a duly licensed real estate broker residing in and conducting his business in Champaign, Illinois; that he had some business association and transactions with Defendant Society on certain properties prior to filing suit and time of the trial; that he had received by U. S. mail the various postal cards from Defendant included in Exhibit 5, signed by D. F. Hubbard, Fieldman for the Defendant company, together with circular letters sent out by the Company

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from its offices in Champaign relating to the sale of various farms, including the land in question identified as farm No. 95, and concerning which he identified Plaintiff's Exhibit 12 as February "News Letter" from the Defendant's branch office in Champaign; that he went to the land, inspected the same, entered some of the buildings and checked the soil and certain soil maps in relation thereto; that he talked with Mrs. Christie about the farm; that he first talked to her over the telephone two or three times, beginning about October 1st, 1941 concerning this farm; that she told him what she wanted; that he told her the farm had 240 acres but had a drainage ditch across the land to which she objected and they discussed another half section nearby; that he showed her several of Defendant's places, including said farm, some of which were later sold, and then went back to see the 240 acre farm in question; that they had driven around the farm in his car but not upon it and she objected to the ditch, stating that the doctor wouldn't allow it; that he then talked with company representatives in the Equitable office about Mrs. Christie as a purchaser of the farm; that he talked with Haines, Hardison and Maxwell and told Hardison that he could get an offer on the Goodwin half section which was later sold and was told that they had an offer on it and it would take more money to buy it; that she (Mrs. Christie) said she didn't want any \$300 ground, that she was selling land to the Government for less at Illiopolis and desired to reinvest; that the Plaintiff had other conversations with Mrs. Christie which took place in the home near the Champaign Country Club about midwinter and also after she returned from Florida in February; that they had talked by phone about two tracts including farm No. 95, the latter being a conversation had with Plaintiff before she left for Florida, in which she stated "we will talk about it after we come back;" that after her return, he went to the house and conversed with her and showed her the soil map referred to at the trial, including the kind of soil upon the farm; that she said she would take the rest of the interested parties out there to view the land but did not know just

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when they could go and see whether they like the farm or not and if they do "I will make you an offer on it" ; that he called her up again in two or three days but they had not been out to see it and he offered to take her or all of them out then or any later time; that she replied that the doctor could not always go but they would run out and see the place and if satisfied, would make an offer; and after that he talked to her a couple of more times on the phone and was told that it was useless to call her until she would call him stating "any time we get ready to make an offer I will call you back." That was the last time he talked to her because he found out that the place had in the meantime been sold by the company on her written bid therefor; that he was not present when the sale was completed; that he had a previous conversation with Mr. Hardison and Mr. Maxwell about Mrs. Christie at the Equitable office after the 320 acre tract had been sold and talked to others at the office and said he thought Mrs. Christie would buy that 240 and Hardison said "Well, get me an offer on the place and we will sell it to her." That Maxwell who was present did not make any reply. That the farm was listed at \$42,000 when he first received the list; that he talked with Mr. Hardison concerning the price as to how much less it could be bought than \$42,000 and was told by the latter that he did not think so but to "Get me an offer on it"; that he then told Mrs. Christie it was the least price he could quote but tried to get her to submit an offer for \$5.00 less per acre or to make some offer; that he advertised the farm for three months in the News-Gazette. Upon cross examination, the facts and circumstances concerning the above and various other transactions between Plaintiff and the company were gone into in detail by Defendant's counsel, and admitted ^{later} and/permitted to stand upon objection by Defendant. as tending to "show the course of dealings between these parties" (abst. 44) including also extensive cross-examination concerning the various

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exhibits and the clause at the bottom of each page of the lists and that Plaintiff saw the statement "No commission shall be deemed to be earned, due, owing or payable to any broker until and unless the sale is closed through him and the deed to the purchaser delivered and accepted." That he had other negotiations with Defendant and had closed several sales and collected commissions, as developed on cross-examination, concerning which he had signed a paper in each instance stating that he had procured the purchaser and was paid his commission; that he personally procured no signed offer to purchase the farm in question; that he drove out with Lucille Christie and showed her the farm in his automobile on two occasions about the middle of October and also showed her other farms which trips were about a week apart; that she said when he talked to her that there were several of them looking for a farm but she was the one that was doing the buying for them and wanted to take them out and show them around when they had the opportunity to do so. On redirect examination, Plaintiff further testified concerning farm No. 95, that he did not see the written offer procured by Mr. Hubbard but Mr. Hardison told him the offer had been signed.

Mrs. Lucille Christie testified in substance concerning Plaintiff's Exhibit 13, which is an offer of \$41,500 to purchase the real estate in question and was signed by her at her home, dated June 26, 1942, when she says that Mr. Hubbard representing the company was present; that Mr. Hubbard represents The Equitable Life Assurance Society, was then present in the court room and was identified by Mrs. Christie; that no real estate broker was present when she signed the offer; that prior to the time of signing the offer, she had a conversation with Guy W. Martin concerning this particular farm; that Mr. Martin was the first real estate broker who ever mentioned this farm to her. On cross-examination, she further testified

and that the

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that the conversation with Mr. Martin about the farm was that he wanted to sell the farm and had called her up and asked if he could take her up to show her this farm and she told him she wasn't particularly interested; that he called later and came out and showed her one of these maps; that is, on a county map; that he showed it to her also in connection with other farms including one down near Sidney; that he had the Equitable list of all the farms before her but she could not say how many and that he said he wanted to take her to see any of them; that he had one conversation with her at the home about the farm and on the telephone several times; that he did talk on the phone about the particular farm in question.

Louis Hardison, called for cross-examination under Section 60 of the Civil Practice Act, supra, testified that he was an employee of The Equitable Life Assurance Society of the United States as Assistant Supervisor in the branch office in Champaign and knows the Plaintiff Martin and talked with him about the particular farm in question, being farm No. 95 as identified, in connection with other listed farms which Martin talked about to the witness and that witness did not recall the first time Martin spoke to him about selling the farm to Mrs. Christie, that in fact he did not talk to him about selling the farm to Mrs. Christie; witness would not say whether Martin had a purchaser for the farm in question. The witness was then permitted to be examined upon purported "Redirect Examination" by Defendant's counsel and said he did not talk about the sale of the farm to the Christies or to Lucille Christie. Mr. D. F. Hubbard, concerning whom Mrs. Christie testified that he had come to her home and had her sign the written offer which occurred subsequent to the time that Plaintiff had talked and phoned to her and shown her the farm as identified in the record, was shown to ^{have} written several postal cards in evidence ^(Ex. 5) addressed to "Mr. Guy Martin, 202 N. Neil Street, Champaign, Illinois," among the last of which was one postmarked July 14, 1942. All of the cards ^{were} addressed to the Plaintiff as "Dear Broker:" and were signed "D. F. Hubbard, Fieldman,

THESE ARE THE ONLY TWO BOOKS IN THE COLLECTION WHICH ARE NOT IN THE
HISTORICAL COLLECTION. THE OTHERS ARE IN THE HISTORICAL COLLECTION.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the administration of the President of the United States, for the term of four years, commencing on the 1st day of March, 1897, and ending on the 1st day of March, 1901.

(Ex. B)

W. Neil Thomas, Chicago, Illinois, was born July 17, 1908
one daughter, Mrs. J. L. Thomas, who now resides at 100
West Adams Street, Chicago, Illinois.

Thomas, W. Neil, was born July 17, 1908, at Chicago,
Illinois, and has one daughter, Mrs. J. L. Thomas,
who now resides at 100 West Adams Street, Chicago,
Illinois.

The Equitable Life Assurance Society of the United States" and set forth Defendant's printed office address as 118 North Neil Street, Champaign, Illinois. On July 15, 1942 a similar card was addressed and mailed to Plaintiff signed "D.F. Hubbard, Fieldman of The Equitable Life Assurance Society of the United States" reading, "Dear Broker: The Equitable has sold its 240 acre Johnson farm, Champaign County, Illinois #95, so please remove this farm from your list. We hope that you will be able to obtain an offer on one of our other farms so we can recommend a commission for you. Very Truly Yours", signed as above. Similar postal cards bearing signatures of D. F. Hubbard as Fieldman for Defendant and addressed to the Plaintiff, bearing dates May 11, 1942 and July 31, 1942 were in evidence announcing sales of certain farms on their list and expressing the hope that the addressee would be able to obtain offers on other farms so that commissions could be recommended for him, together with several similar postal cards in evidence from fieldman George C. Haines and Loan Supervisor George I. Maxwell, all mailed from the Defendant's above Champaign office address, to the Plaintiff and signed as above, were received by the Plaintiff. No contention in denial of the capacity in which David F. Hubbard acted in so taking and reducing to writing Mrs. Christie's written offer to the company appears in the record.

On the printed letterheads and stationery used by the Defendant company and shown in their exhibits appeared its name and home office address in New York, the name of its President, and its branch office address as Room 217, 118 North Neil Street, Champaign, Illinois. The "News Letter," concerning sales and listings of the company appears in Plaintiff's Exhibit 6 showing a similar printed letterhead and designating the same to be the Farm Mortgage Department Branch Office with the printed names of G. W. Maxwell, as Loan Supervisor, H. O. Watson, as Assistant Supervisor and L. M. Hardison as Assistant Supervisor, addressed to The Farm Loan and Real Estate Brokers, and is also signed in ink by David F. Hubbard,

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as Fieldman in charge of loans and George C. Haines in charge of farms; a similar letter (Ex. 7) addressed to the Plaintiff, dated March 10, 1942, on identical printed company letterheads is signed by L. M. Hardison as Assistant Supervisor and refers to Mr. George C. Haines as our Fieldman who will be glad to assist you at any time. Again, on May 6, 1942, it appears from Plaintiff's Ex. 9 written on similar letterheads, that another letter signed by L. M. Hardison, Assistant Supervisor "c/o D. F. Hubbard," inclosed a check to plaintiff Martin for \$750.00 for negotiating the sale of farm No. 11 of Defendant to Dr. Schowengerdt and contained the following significant recital: "We appreciate your cooperation and hope you will be able to obtain offers on our other farms in Champaign County and adjoining counties. Our fieldman Mr. David F. Hubbard will be glad to assist you at any time. Very truly yours, L. M. Hardison, Assistant Supervisor." A similar letter (Ex. 8) on a printed letterhead from said office dated July 11, 1942, signed by L. M. Hardison as Assistant Supervisor "c/o D. F. Hubbard," is addressed to "Mr. Guy Martin at Champaign, Illinois," and included a check for \$1495.00 for negotiating the sale of farm to McKenry and Hayward as the net balance due Martin after deducting \$125.00 credit given to Mr. McKenry and expressing the appreciation for Plaintiff's cooperation and hope that he would obtain offers on other farms in Champaign and adjoining counties, again stating that "Our fieldman, Mr. D. F. Hubbard, will be glad to assist you at any time." This last letter appears to have been written only a few days after June 26, the date on which the aforesaid Mr. Hubbard went to her home alone and procured the signed written offer of Mrs. Christie to the farm in question in this case. Whether or not in so doing, he was assisting the Plaintiff in the manner recited in the previous Hardison letter of May 6, and the letter of July 11 becomes, under the present state of the record, a question of fact. On December 4, 1941, Plaintiff's Exhibit 10, on a similar letterhead, is a letter addressed to Mr. Guy W. Martin, 202 North Neil, Champaign, Illinois, concerning a farm in Vermilion County

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which is signed by L. M. Hardison, Assistant Supervisor. Copy of the letter similarly addressed to Mr. Martin dated March 10, 1942, being Plaintiff's Exhibit 11, is a carbon copy of letter signed by L. M. Hardison, Assistant Supervisor to Mr. Paul McKenry, Route #6, Urbana, Illinois concerning the sale of farm No. 72 bears typewritten notation as follows: "Dear Mr. Martin: Attached please find copy of your commission agreement which has been executed by a duly authorized official of the Society." The attached sales commission agreement of The Equitable Life Assurance Society of the United States, Farm Mortgage Department, with a carbon copy of statement signed and approved by Guy W. Martin, Broker, Champaign, Illinois, so "Approved 3/3-42," set forth details concerning offer, sale and commission paid Martin on sale of farm to McKenry. A similar agreement and receipt by Martin appears to have been given in all other instances in which commission was paid by the Defendant to the Plaintiff in connection with real estate sales referred to in the various exhibits and further so shown and detailed at length in the cross examination by Defendant's counsel and redirect examination of the Plaintiff appearing in the record.

The signed offer of Mrs. Christie taken by Hubbard on June 26, 1942, contained among other recitals, the following in Clause 7: "The closing of title to take place at 118 North Neil Street, Champaign, Illinois, on the 1st day of July, 1942 at 10 o'clock A. M." The said offer was accepted by the company at its home office on June 30, 1942, signed "The Equitable Life Assurance Society of the United States by George McHugh, 3rd Vice President." Clause 12 thereof recites "We represent that Bruce Rinehart and Frank Miner, a real estate broker of Monticello, Illinois, is the only person through whom we have negotiated for the purchase of said real estate and that he brought about this transaction." The basis of this recital does not appear, since neither the names nor any reference to any service rendered by such brokers or by any other broker than the Plaintiff appears elsewhere in the

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 distributed outside your agency.

record, and the recital thereof was neither signed, approved by nor binding upon the Plaintiff and states a legal conclusion. Mrs. Christie's testimony that the Plaintiff was the first broker who solicited the purchase of the premises by her and took her to see the premises and urged the sale on various occasions and that she signed the offer through Hubbard in the absence of any broker, stands uncontradicted and the above recital could only bear upon the weight and credibility of her testimony in relation thereto. The Plaintiff's testimony as to his services and as to conversations with Hardison concerning his prospect Mrs. Christie, which were only in part denied by Hardison upon cross examination and to some extent corroborated the same, together with the communications and letters concerning services of Martin and the status of Hardison and Hubbard as company representatives cannot be ignored and must be considered in passing upon the motion. It may also be noted that Defendant's "Fieldman in charge of loans" (Ex 6) Mr. D. F. Hubbard, was repeatedly designated in Hardison's correspondence, copies of which were sent "c/o Hubbard", as one who would gladly assist the Plaintiff in negotiating the sales and that said Hubbard had worked with Plaintiff whose "cooperation" was "appreciated" (Ex. 9) in closing previous sales and was also identified as the man who shortly thereafter went alone to the home of Mrs. Christie and procured from her the written offer to buy the farm, therein setting forth the above recital. While this evidence might be explained or overcome by the Defendant upon further proof and as a matter of defense; upon the motion for a directed verdict, the testimony on behalf of the Plaintiff, together with all legitimate and reasonable inferences therefrom, must be viewed and considered in the light most favorable to the Plaintiff, and when so considered we are unable to say that there is no evidence in the record tending to prove the material allegations of the complaint or the necessary elements of Plaintiff's alleged cause of action. Carrell v. New York Cent. R.Co., 317 Ill.App. 481, 491; 47 N.E.(2d) 30; affirmed 384 Ill. 599; 52 N.E. (2d) 201; Blumb v. Getz, 366 Ill. 273, 8 N. E. (2d) 620.

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Defendant strongly stresses the fact that the instructions, letters or contract concerning the payment of commissions specifically provides that the Plaintiff is not entitled to the payment of commissions unless and until he consummates the sale and that the transactions closing the same must be made through him. While that may well be conceded here, we need only repeat that it appears from the record that Hubbard, who is designated as Fieldman or as Fieldman in charge of loans, in various exhibits, and who was expressly delegated in writing to assist Plaintiff in the negotiation of his various transactions, did procure the written offer and that Mrs. Christie recognized him as a representative of the company and not as a broker and further recited that when she signed and submitted this written offer, no broker was present to procure such written offer. Whether or not a different broker was recognized and paid by the Defendant company is not material in passing upon the motion herein. While the company representative apparently transmitted the offer to the home office, followed by the final acceptance thereof and consummation of the sale without the knowledge of the Plaintiff, the Defendant company could not by such action alone deprive Plaintiff of his right of action to recover any earned commissions. A real estate broker who begins negotiations for the sale of real estate for his principal, which are carried on to final sale, cannot be deprived of his right to commissions merely because the principal took up and completed the negotiations himself or through another party. *Rigdon v. More*, 226 Ill. 382-387; 80 N. E. 901; *Hafner V. Herron*, 165 Ill. 242; 46 N. E. 211. Such action by the Defendant, might, by reasonable inference from facts and circumstances in evidence, well constitute and imply a waiver of that particular provision of the contract which required the Plaintiff to procure and submit the written offer and personally consummate the transaction and delivery of the deeds of conveyance necessarily executed and delivered by the Defendant to the purchaser.

Whether, under the evidence herein, it appears that the services and efforts of the Plaintiff were the procuring cause and effective means of bringing about the sale of the real estate in question, either alone or with the voluntary assistance of the Defendant, or whether the actions of the Defendant as disclosed by the record in consummating such sale, constituted a waiver of the requirement that the sale be consummated by the Plaintiff, became questions of fact requiring submission of the case to the jury under applicable instructions as to the law by the Court. Reed v. Young, 146 Ill. App. 210.

In the recent case of Groome v. Freyn Eng. Co., 374 Ill. 113 at page 125; 28 N. E.(2d) 274, concerning the sales contract therein discussed, it is said that: "if appellees were the efficient cause of producing a customer who was willing to buy the engineering skill or other property of Appellant upon terms fixed by the latter, and such contract was actually entered into, the agent would be entitled to the compensation agreed upon, (Henry v. Stewart, 185 Ill. 448; Hafner v. Herron, 165 Ill. 242; ^{Monroe v. Snow, 131 Id. 126;} and in such cases an agent will not be deprived of his commission because the principal assisted or took part in the negotiations which resulted in the contract for such services or property. Rigdon v. More, 226 Ill. 382. " What part, if any, the brokers Rinehart and Minor actually took in closing the transaction does not now appear from the record, although it appears that they did not personally procure and submit written offer accepted by the Defendant.

In Rigdon v. More, supra, the Supreme Court, at page 387, quotes with approval from the case of Hafner v. Herron, 165 Ill. 242, 46 N. E. 311, the following principle of law: "Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by the broker. It is

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 DEPARTMENT OF PHYSICS
 530 SOUTH EAST ASIAN AVENUE
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sufficient if the sale is effected through the efforts of the broker or through information derived from him. (Sassdorf v. Schmidt, 55 N.Y. 319; Stewart v. Mather, 32 Wis. 344; Lincoln v. McClatchie, 36 Conn. 136). While the facts in the instant case are not parallel to the facts in the cases which we have cited, supra, or from which we have quoted, we deem the principles therein stated to be applicable under the evidence in the present state of the record herein and that a prima facie cause of action was proven by the Plaintiff. The Defendant should be required as a matter of defense, if he sees fit to do so, to affirmatively sustain his defense upon the merits on submission of the case to a jury under proper instructions by the Court as to the law.

In Plaintiff's ^{further} assignment of error to the effect that the Trial Court erred in not holding that the motion for a directed verdict was contrary to the manifest weight of the evidence, we find no merit. No such question can be considered upon a motion for a directed verdict at the close of the Plaintiff's evidence and could only arise under a motion for a new trial, wherein the question of the manifest weight of the evidence may properly be raised and considered. We hold it to be the well settled rule of law in this State, ^{that} in passing upon a motion for a directed jury verdict, the Trial Court is confined to the question of whether or not there is any legal and competent evidence in the record, which, with reasonable and legitimate inferences therefrom, viewed in the light most favorable to the Plaintiff or party against whom the motion is interposed, tends to prove the material allegations of the complaint or material elements of the cause of action alleged and set forth therein. If such prima facie proofs appear, the motion should be denied and the instruction refused. If it does not so appear, the motion should be allowed and the instruction given.

Further alleged error is assigned that upon a motion for directed verdict, the Court may not consider any evidence developed by cross examination of Plaintiff or his witnesses. We are not in

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accord with this view. Insofar as the cross examination is confined to the scope of the direct examination and to the material allegations of the complaint, it may be considered by the Court together with all other competent evidence in passing upon such motion. Incompetent or immaterial evidence, or evidence beyond the scope of the direct examination^{which} may be elicited in support of an affirmative defense may not be so considered upon said motion. While material testimony properly elicited upon cross examination may be so considered by the Court; such evidence, together with all other legal and competent testimony on behalf of the Plaintiff, must be considered and viewed with all reasonable inferences therefrom, in the light most favorable to the Plaintiff, in passing upon Defendant's motion for a directed verdict.

We hold that prima facie proof of the Plaintiff's alleged cause of action appears in the record, and that therefore, the Trial Court committed prejudicial and reversible error in granting Defendant's motion for a directed verdict and in entering thereon a judgment in bar of suit and for costs at the close of the Plaintiff's evidence. Such prejudicial error requires reversal of the judgment and remandment of this cause to the Trial Court with directions to proceed in accordance with the holdings herein. The judgment of the Circuit Court of Champaign County is therefore reversed and the cause remanded with directions to set aside the judgment, deny the Defendant's motion for a directed verdict and proceed in accordance with the further holdings of this Court.

REVERSED AND REMANDED WITH DIRECTIONS.

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IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1944

JOHN R. SNIVELY, and JAMES W.
SNIVELY, BY JOHN R. SNIVELY,
HIS FATHER AND NEXT FRIEND,
APPELLANTS,
vs.
MERLE G. BARBER, DOING BUSINESS
AS BARBER'S WHOLESALE GROCERY,
and WILLIAM A. GOWAN,
APPELLEES.

323 I.A. 69²

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY.

HUFFMAN, J.

This is an action by appellants to recover for damages resulting from a collision between appellant, John R. Snively's automobile and that of appellee, Merle G. Barber. James W. Snively, son of John R. Snively, was driving his father's car. Appellee Barber's car was being driven by his agent, William A. Gowan.

Both cars were travelling on an improved, concrete highway and in a westerly direction. As the cars approached an intersection in the highway, appellants contend that

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the speed of appellee's car was suddenly reduced and the car turned to the left across the pavement in the path of appellant's car, which made the collision unavoidable, all of which the driver of appellee's car stoutly denies.

The case was heard before the court without a jury. The court found appellants were precluded from recovery because of contributory negligence. His summary of the evidence, together with the deductions arrived at therefrom, appear on pages 33 to 38 of the abstract. The evidence in the case concerning the accident itself consists of the testimony of James W. Snively for appellants, and William A. Gowan for appellee. There is no question involved in the case except one of fact. Although the evidence is brief, no good purpose would be served by detailing the same herein.

The element of surprise always exists in automobile accident cases. They usually happen suddenly and unexpectedly. It cannot be assumed they are anticipated by the parties involved, as no one would intentionally seek to incur injury to his person or property. Since the element of surprise invades cases of this character, we find a wide field for individual versions of how and why the accident happened. People's reactions to sudden events differ widely, although each may firmly feel his version is the correct one. The court in this instance, reviewed the testimony with respect to its deductions therefrom and the conclusions arrived at. The trial court who hears the

evidence is in a more favorable position with respect to his findings thereon than a court of review. This court is reluctant to disturb the judgment of a trial court where it does not appear his conclusions are manifestly erroneous. Estate of Sandusky, 321 Ill. App. 1, 19.

The judgment of the trial court is affirmed.

Judgment affirmed.

App. & Error -

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The First National Bank of Abingdon failed, and on August 29, 1927, transferred its assets to the First State & Savings Bank of Abingdon, which assumed liabilities of the National Bank. Appellees were directors of the National Bank. In the agreement between the two banks, and pursuant to that portion thereof designated "Directors' Guarantee Fund," appellees executed their notes in the total amount of \$56,156, and placed same with the State Bank. This provision of the liquidating agreement provided that the corporate note of the National Bank in the sum of \$75,000,

and the equities of the National Bank represented by shares of stock in the Bank of St. Augustine, were to be deposited with the State Bank as collateral security to appellees' notes. The provision then recited what should be done with the receipts from the corporate note and the shares of stock in the Bank of St. Augustine, after appellees' notes and interest had been liquidated from the proceeds thereof.

On November 5, 1927, the First State & Savings Bank reduced the corporate note of the National Bank to judgment, in the sum of \$77,135.97, gave notice thereof to the Comptroller of the Currency, and filed its claim therefor. On November 12, 1929, the First State & Savings Bank was closed by the Auditor of Public Accounts. On January 30, 1930, a liquidating agreement was made between the First State & Savings Bank and the plaintiff in this suit, the Abingdon Bank & Trust Company. Appellant thereby became possessed of appellees' notes (renewals of same) by virtue of the liquidating contract between it and the First State & Savings Bank.

directors In April, 1939, appellant bank brought suit against appellees upon their notes which originated in the agreement between the First National Bank of Abingdon and the First State & Savings Bank of Abingdon, as aforesaid. The notes sued on are dated March 29, 1929, due six months after date, and are renewals of the notes given in 1927. *gibson*

The first trial resulted in a judgment against appellees, which on appeal to this court was reversed (312 Ill. App. 177).

Plaintiff bank thereafter filed its motion supported by affidavits, setting up that it had made discovery of certain evidence which would conclusively prove and demonstrate the defendants were not entitled to credit of the sum of \$36,850, in the manner held by this court in its opinion. Pursuant to such motion and affidavits, this court on December 15, 1941, modified its opinion to read: "Judgment reversed and cause remanded for another trial." The petition for rehearing was on said date denied. (It will be noted the opinion as reported, discloses the petition for rehearing denied on said date, but does not disclose the opinion was modified as above indicated).

The sole contention of plaintiff bank in its petition and affidavits, whereby it secured the modification of this court's opinion, was based upon the manner in which this court had allowed credit to the defendants for their payment of the said sum of \$36,850. No contentions were raised as to other credits involved, and nothing was to be gained by relitigating the same issues for a second time after they had once been adjudicated by this court. The trial court in the present hearing recognized the situation in his remarks (p. 250 of Abs.), where he states that, "the controversy between the parties pertains to the credit to be given on directors' notes as provided by the contract." The only dispute with which we are concerned in this appeal is whether the defendant directors shall be given credit on their notes for the sum of \$36,850, as granted by the court, or denied such credit pursuant to the contention of appellants.

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Since the facts were fully developed in the previous opinion of this court by Mr. Justice Wolfe, we do not consider a second recital of the same necessary. Our attention shall be directed solely to the question whether from the evidence on the second trial, the defendant directors are entitled to credit upon their notes for payment of the above sum of money.

The second hearing was before the court. Judgment was rendered in favor of appellee-defendants. Plaintiff Bank and Trust Company appeals from such judgment.

The corporate note of \$75,000, represented the total stock liability of the stockholders in the National Bank. The said sum of \$36,850, the subject of this controversy, represented appellee stockholders' liability. Instead of their paying it to the receiver of the National Bank, they turned it over to the State Bank, at the time of the transfer of the assets of the National Bank to the State Bank, and at the instance of the National Bank Examiner, who was directing the transfer. A receiver for the National Bank had not at that time been appointed. This irregularity was later cleared between the State Bank and the Comptroller of the Currency by the exchange of checks in November, 1928, at which time the State Bank executed a receipt therefor to the Comptroller, designated as a second dividend against the First National Bank of Abingdon. We shall refer to this operation more in detail later.

It is undisputed that between the execution of the original notes by appellees in August, 1927, and the renewals thereof involved herein, given under date of March 29, 1929, the First

State & Savings Bank received dividends from the receiver of the First National Bank in an amount in excess of that due by virtue of appellees' notes. This statement is based on the assumption that the \$36,850, paid by appellees upon their stock liability, is to be treated as a dividend from the National Bank to the State Bank. Appellant claims it should not be so considered, urging that it should be treated as a part of the cash assets of the National Bank, passing from it to the State Bank by virtue of the liquidating agreement.

Pursuant to this position, appellant sought to contradict and impeach the dividend receipt from the First State & Savings Bank to the Comptroller of the Currency for the \$36,850, paid by appellees upon their stockholders' liability. In this connection it appears from the letter appointing the receiver of the National Bank, that he was advised as follows: "You have today been appointed receiver of the First National Bank of Abingdon, Illinois, for the purpose of collecting an assessment against the shareholders of that bank to satisfy the judgment obtained against it by the First State and Savings Bank." He was further advised therein that, "According to the National Bank Act, all funds collected from an assessment against stockholders must be distributed by the Comptroller of the Currency in the form of dividends." From the correspondence between the receiver and the comptroller's office, it appears that at the time the National Bank was "taken over" by the First State & Savings Bank, the directors then paid a hundred percent assessment upon their stock, under the direction of Mr. Moon, the

National Bank examiner in charge of the transaction. In response to this information, the Comptroller advised the receiver of the National Bank that the directors as shareholders thereof, had paid their stock assessment prior to the time the same was fixed and the assessment ordered against them by the Comptroller's office, and that therefore, the money so paid by them at the time of the transfer of the assets of the National Bank to the State Bank, could not be considered as a payment of their statutory assessment, for the reason that the Comptroller had not at that time levied an assessment. The receiver was advised in such letter that in order for the directors to receive proper credit on the books of the receivership and of the Comptroller's office, for the payment of their assessment, arrangement must be made with the creditor bank (State Bank) to release to the receiver the money so paid. The letter then goes on to say that since the State Bank is the only creditor, the Comptroller would immediately turn over to the State Bank the cash so released by it, in the form of a dividend. The receiver was advised that as soon as the State Bank had so acted, he should recommend the payment to it of a dividend equal to the funds represented by the directors stock assessment liability. It was following this correspondence between the Receiver of the National Bank and the Comptroller of the Currency that the matter with respect to appellees' payment of their stock assessment of \$36,850, was clarified and adjusted, by the Comptroller issuing a check to the State Bank for such amount, as dividend check No. 62374, and designated

as a second dividend. The check was payable to the First State & Savings Bank. That bank endorsed same and returned it to the receiver, whereupon the records of the Comptroller's office were brought into proper adjustment. The receiver of the National Bank took a receipt from the First State & Savings Bank showing payment of said sum of \$36,850, as a second dividend from the receivership of the First National Bank of Abingdon.

The correspondence in this case clearly identifies the fund as that advanced by appellees upon their stockholders liability, at the time of the transfer of assets of the National Bank to the State Bank. The letters of the Comptroller clearly outline the manner in which the matter was to be handled in order to bring the books of his office into proper adjustment with the facts. The State Bank appears to have had full knowledge of the correspondence between the receiver and the Comptroller, and clearly understood that the purpose thereof was to clear up the matter of the payment by appellees of their stockholders liability. The situation was taken care of according to the directions of the Comptroller. Payment of appellees stock assessment in full was entered upon the books of the Comptroller's office pursuant to his order of assessment. Such sum was duly receipted for by the State Bank upon its claim against the National Bank by virtue of its judgment on the \$75,000. note.

In the former opinion of this court, it was found that appellees had no knowledge of the dividends received by the State Bank from the receiver of the National Bank, upon its judgment taken on the \$75,000, note, at the time they executed

the renewal notes sued on. This court further found that appellees owed nothing to the First State and Savings Bank, at the time the renewal notes were executed. We find nothing in the second trial to cause us to change our former conclusion in this regard.

Appellees pled the defense of ultra vires, but all transactions under the liquidation agreement appear to have been concluded.

The judgment is therefore affirmed.

Judgment affirmed.

Judgment in favor of appellants against
appellees by default of bank, wherein
directors were allowed credit for
certain sums paid by them pursuant
to attempt to reduce liability,
was sustained by evidence, and
would be affirmed.

The present report is a continuation of the work done in the previous report, and is intended to show the progress of the work done since the last report. The first part of the report deals with the general principles of the work, and the second part deals with the results of the work done.

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The first part of the report deals with the general principles of the work, and the second part deals with the results of the work done.

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323 I.A. 30²

MINNIE WEINSTEIN,
Appellee,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the beneficiary of three life insurance policies issued by defendant to her husband, Abraham Weinstein, brought an action to recover on the three policies, the first dated May 1, 1937 for \$1,500, the second dated October 18, 1937 for \$8,500 and the third dated December 15, 1937 for \$5,000. There was a jury trial and a verdict in plaintiff's favor for \$1,500. Defendant moved for judgment notwithstanding the verdict as to the second and third policies. The court allowed the motion as to the \$5,000 policy but overruled the motion as to the policy for \$8,500, also overruled plaintiff's motion for a new trial and judgment was entered in plaintiff's favor against defendant for \$7,800, being the face value of the first and third policies aggregating \$6,500 and the balance of \$1,300 was for accrued interest. Defendant appeals and plaintiff assigns cross error on the ground that judgment notwithstanding the verdict should have been entered for the face of the three policies.

The case has been tried three times. The first trial resulted in a verdict in plaintiff's favor on April 21, 1941, for \$1,500. Plaintiff's motion for a new trial was allowed and defendant's petition for leave to appeal to this court was denied. The jury on the second trial returned a verdict February 26, 1942, and assessed plaintiff's damages at \$7,500. Defendant's motion

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for a new trial was allowed and on the oral argument it was stated that the new trial was allowed because the amount of the verdict was inaccurate in any view of the case. On the trial of the case the third time the jury on May 5, 1942, returned a verdict for \$1,500 in plaintiff's favor, as above stated.

On this appeal defendant, Insurance Company, makes no complaint of the verdict of the jury in plaintiff's favor for \$1,500 but counsel contend that the trial court should have entered judgment on the verdict and that the court erred in sustaining plaintiff's motion in part and entering judgment notwithstanding the verdict for the amount of the first and third policies. On the other hand, counsel for plaintiff contend that their motion for judgment notwithstanding the verdict should have been allowed and judgment entered in plaintiff's favor for the face value of the three policies, with statutory interest.

The defense interposed was that the insured, Abraham Weinstein, made false answers to the questions put to him in his application for insurance. That the answers were knowingly false and were material and that the jury, by their verdict, found in defendant's favor as to the two policies involved in this appeal.

The evidence shows that on March 30, 1937, Weinstein made application for \$1,500 of insurance and on October 5, 1937, made his second application. In connection with this application he appeared before the medical examiner October 10, 1937, and was asked by the examiner: "Have you ever been an inmate of a hospital, sanitorium, asylum or cure whether for observation, examination or treatment? If yes, give date, duration, nature of ailment and name of institution. no. Have you ever had any ailment or disease of (a) The Brain or Nervous System? no. The Heart or Lungs? no. (c) The Stomach or Intestines, Liver, Kidneys or Genito-Urinary organs? no. Have you consulted a physician for any ailment or disease not included in your above answers? no. "What clinics,

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hospitals, physicians, healers or other practitioners, if any, not named above, have you consulted or been treated by, within the past five years? If none, so state. none."

In the application for the \$5,000 policy November 19, 1937 which is stated to be for additional insurance and refers to the "original application" - the one on which the \$8,500 policy was issued - the insured was asked: "Have you consulted any physician or suffered any illness, disease or injury since the date of the 'original application'? If yes, give particulars. No." There was also attached to and made a part of that policy a copy of the application which the insured made the basis on which the \$8,500 policy was issued.

The uncontradicted evidence is that the insured and plaintiff, his wife, on September 20 their wedding anniversary went to the Mayo Clinic in Rochester, Minnesota, where he was examined by doctors on September 21, and September 23, 1937. He complained of stomach trouble and the doctor told him that the examination showed evidence of a duodenal ulcer and that his tonsils were infected. He was advised regarding the treatment of the ulcer. The heart was normal at the time and a dietary treatment for ulcer, similar to the Dr. Sippy treatment, was recommended.

Dr. Lenn, of Chicago, called by defendant, testified that the insured came to him October 18, 1937, at which time the doctor examined him and was informed by Mr. Weinstein that he had been to the Mayo Clinic. The doctor sent him to Mount Sinai Hospital and the next day removed Mr. Weinstein's tonsils which showed evidence of infection. The doctor further testified that the removal of the tonsils did not make any difference as to the health of the insured except that in the doctor's opinion it would improve the insured's health. The immediate cause of the insured's death on April 1, 1938, was angina pectoris.

Plaintiff offered in evidence a letter from the second vice president of the defendant company, written from the home office

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in New York City, to the insured in Chicago, dated November 12, 1937 (in connection with the application for the \$5,000 policy) in which it is stated that the company had received the application from the Chicago representative and it was gratified by this evidence of Mr. Weinstein's satisfaction of their contracts of insurance issued to him. That the fine picture the company had of Mr. Weinstein showed that he was an excellent insurance risk. That in view of these facts, the company was willing to consider Mr. Weinstein for an additional policy for \$5,000 "Whole Life Insurance without the need for any further evidence of insurability. All we require to put the additional contract in force for the protection of your family is your O.K. and your check for the necessary premium."

44 The trial court in granting defendant's motion for a judgment notwithstanding the verdict as to the \$5,000 policy, referred to this letter, and we think based his decision principally upon it. The court said: "I cannot let this verdict stand as it is. It is not in conformity with the evidence. It is against the manifest weight of the evidence, so far as the \$5,000 - policy is concerned, I think the jury was justified in finding the \$1,500 for the plaintiff. *** I cannot quarrel with the jury on the \$8,500 - policy, but the \$5,000 - policy might be looking beyond the point, if they thought *** the misrepresentation was material to the risk." That if the suit had been brought on the \$5,000 policy alone and the evidence were the same, he would have to direct a verdict for the plaintiff.

We think the decision of the court cannot be sustained. The letter was written on the assumption that the answers made by the insured to the questions put to him in his application upon which the \$8,500 policy was issued were true - that he had not consulted a doctor or been treated at a clinic within five years, or at any other time. The uncontradicted evidence, or at least the overwhelming weight of it, shows that the answers complained ^{of} were

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The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a pale, hazy blue. The air was still, and the silence was broken only by the distant hum of traffic. I took a deep breath, feeling the cold air fill my lungs. The world around me seemed to be holding its breath, waiting for something to happen. I walked slowly, my feet sinking into the soft ground. The sun was low in the sky, casting a long, golden glow over the landscape. I felt a sense of peace, a sense of being alone in a vast, open world. The cold was not unpleasant, it was refreshing. I had been waiting for this moment, for this feeling. It was here, in this quiet, cold place, that I found myself.

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not true, but on the contrary, that he had been examined at the Mayo Clinic with the result as above stated. This was the view of the jury. They were instructed at plaintiff's request that in order for the defendant to avoid liability on any of the policies for the alleged false answers in the application, it was necessary for the insurance company to prove by a greater weight of the evidence that the answer made by Mr. Weinstein was material to the acceptance of the risk and that he knew such answer was false and made it with actual intent to deceive the insurance company.

Upon a consideration of all the evidence in the record we are unable to say that the finding of the jury as to the \$8,500 and \$5,000 policies in favor of defendant is against the manifest weight of the evidence. It follows that the court erred in granting plaintiff's motion in part for a judgment notwithstanding the verdict and for the same reason, the plaintiff's contention that the court should have allowed its motion for judgment notwithstanding the verdict as to the \$8,500 policy cannot be sustained. And there is nothing in Thompson v. State Mut. Life Assur. Co., 305 Ill. App. 255, upon which plaintiff places reliance, contrary to the above holding. In that case the applicant for insurance after answering a number of questions as to the state of his health said that he had not consulted a doctor for the last five years, while the evidence showed he had been treated for influenza, sore throat, etc., for which he was laid up at home for about a week. We held this was trivial and further, that the chief medical examiner for the insurance company testified that he knew the answers made by the applicant were not true because they had prior to that time issued other policies to him where his answers were different. We further held that there was no intention to defraud.

Counsel for plaintiff further contend that the court erred in giving instruction #9 at defendant's request. That instruction

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is as follows: "The Court instructs the jury as a matter of law that it is the actual condition of health of the insured which controls and not his apparent health or what he or anyone thought his health to be." This instruction is wrong but it is merely abstract in form and does not direct a verdict. Other instructions were given by which the jury were told that false answers made by Mr. Weinstein to questions would not avoid the policy unless the insurance company proved by the greater weight of the evidence that the applicant knew such answers were false and were made with actual intent to deceive the insurance company. We think the jury clearly understood the issues they were to decide and were in no way misled by instruction #9.

The judgment of the Circuit court of Cook county sustaining plaintiff's motion in part for judgment notwithstanding the verdict as to the \$5,000 policy is reversed and the matter remanded with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

as follows: "The Court hereby orders that the

case be set aside and a new trial granted.

It is so ordered. The Clerk of the Court is directed to

enter this judgment and to issue the necessary writs.

Witness my hand and the seal of the Court at the City of New York,

this 10th day of June, 1906.

Very truly yours,

John M. McKim, Clerk of the Court.

That the Court hereby orders that the case be set aside

and a new trial granted. It is so ordered.

The Clerk of the Court is directed to enter this

judgment and to issue the necessary writs.

Witness my hand and the seal of the Court at the City of New York,

this 10th day of June, 1906.

Very truly yours,

John M. McKim, Clerk of the Court.

That the Court hereby orders that the case be set aside

and a new trial granted. It is so ordered.

42469

JACK ELLIOTT and JOSEPH
EPSTEIN,

Appellees,

v.

BULK SERVICE STATIONS, INC.,
a Corporation,

Appellant.

445
APPEAL FROM

167
SUPERIOR COURT,
COOK COUNTY.

323 I.A. 71

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against defendant to recover damages claimed to have been sustained by them on account of their wrongful eviction from a gas filling and service station which they had leased from defendant. There was a trial before the court without a jury, a finding and judgment in plaintiffs' favor for \$2,220 and defendant appeals.

The record discloses that August 4, 1939, the parties entered into a written agreement which is designated "Lease and Franchise Agreement" whereby defendant leased to plaintiffs one of defendant's gas filling and service stations, No. 12, located at 5701 Cottage Grove Avenue, Chicago, for a period beginning August 1, 1939 and ending July 31, 1940, unless sooner terminated as provided in the lease. The minimum rental was \$200 and the maximum \$350 per month, according to the number of gallons of gasoline which defendant delivered to plaintiffs, etc. Plaintiffs went into possession and operated the station until March 1, 1940, when they contend they were wrongfully evicted by defendant. On the other side, defendant's position is that plaintiffs, in the operation of the station permitted it to be dirty and improperly kept, etc., for which they had a right to cancel the lease and that as a matter of fact, plaintiffs surrendered possession of the station to defendant on March 1, 1940.

There is considerable evidence in the record tending to

1. The record in this case is as follows: On March 1, 1944, the defendant, who is a member of the Communist Party, was arrested by the New York City Police Department. He was charged with the crime of conspiracy to defraud the United States. The record in this case is as follows: On March 1, 1944, the defendant, who is a member of the Communist Party, was arrested by the New York City Police Department. He was charged with the crime of conspiracy to defraud the United States.

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sustain the respective positions of the parties as to the method in which plaintiffs conducted the station and whether they voluntarily surrendered it to defendant. The court found plaintiffs had substantially complied with the terms of the lease; that they did not surrender possession of the station to defendant and that under a stipulation entered into by the parties, the damages were agreed, in case there was to be a recovery, to be \$2,000 and \$220 which it is conceded defendant owed plaintiffs for some of plaintiffs' property which defendant took over on March 1.

We have considered all of the evidence in the record and the argument of counsel for the respective parties and are of opinion that we would not be warranted in disturbing the finding of the court to the effect that plaintiffs substantially complied with the terms of the lease, as being against the manifest weight of the evidence. And the overwhelming weight of the evidence sustains the finding of the court to the effect that defendant forcibly took physical possession and ejected plaintiffs from the premises. In these circumstances we are not warranted, under the law, in disturbing the finding and judgment of the court.

There is considerable argument in the briefs that the amount of the judgment is not warranted. Counsel for defendant admit there is due plaintiffs \$220 for the property taken by defendant when it took possession on March 1, but contend that under the stipulation entered into between the parties on the question of the balance of plaintiffs' claimed damages, the court erred in finding that it was agreed that this damage was \$2,000. Counsel further contend that no part of this \$2,000 should have been allowed because it was excluded by the terms of the stipulation.

The question for decision on this point is the interpretation of the stipulation and the law applicable. The stipulation was made March 24, 1942, and the cause went to trial May 11, 1942.

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voluntarily submitted it to the court. The court found that

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By the stipulation it was agreed that defendant had full supervision, management and control and operated the gas filling and service station from March 1, 1940, to and including July 31, 1940, and

"2. That during the period beginning March 1, 1940, and ending July 31, 1940, the profit derived from the operation of said gasoline filling and service station after the payment of all operating costs and expenses and the costs of all goods, wares and merchandise sold from said station, and the payment of all wages and salaries to employees excepting plaintiffs, would have been the sum of Two Thousand (\$2,000.00) Dollars, (out of which sum the plaintiffs would have had to receive all compensation for their personal services in the operation of said gasoline filling and service station during said period) if the plaintiffs, Jack Elliott and Joseph Epstein, had operated said gasoline filling and service station during the period beginning March 1, 1940, to and including July 31, 1940, instead of the defendant, and it is hereby expressly stipulated that both of the plaintiffs would have worked at said gasoline filling and service station regularly and would have devoted all of their time to said gasoline filling and service station during all of said period.

"3. That the reasonable value of the services of the plaintiffs as operators of the gasoline filling and service station during the said period beginning March 1, 1940, to and including July 31, 1940, is the sum of Two Thousand (2,000.00) Dollars;

"4. That the defendant by this stipulation does not waive its right to claim as a matter of law that the reasonable compensation or value of the services of the plaintiffs during said period should be deducted from the aforesaid profits of said gasoline filling and service station."

We think the meaning of this stipulation is that plaintiffs took possession of the station March 1, 1940, and operated and com-

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By the stipulation it was agreed that defendant had full control
vision, management and control and operated the said filling and
service station from March 1, 1940, to and including July 11, 1940,
and

"2. That during the period beginning March 1, 1940, and
ending July 11, 1940, the said defendant had the possession of said
gasoline filling and service station and during the period of his con-
trolling said station and during the period of his control, he was
entitled to receive from said station, and the payment of all moneys
and salaries to employees operating said station, and all other moneys
the sum of two thousand (\$2,000.00) dollars, less of which sum
the plaintiff would have been entitled to receive from the said
personal services and operation of said gasoline filling and
service station during said period, it was stipulated, that the filling
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station during the period beginning March 1, 1940, to and including
July 11, 1940, in and of the defendant, and it was stipulated
stipulated that both of the stipulations would have been of said
gasoline filling and service station and during said period
devoted all of said time to said gasoline filling and service
station during all of said period.

"3. That the defendant claims of the value of the station
little as operators of the gasoline filling and service station
during the said period beginning March 1, 1940, to and including
July 11, 1940, is the sum of two thousand (\$2,000.00) dollars;
"4. That the defendant by said stipulations does not waive
its right to claim as a matter of law that the defendant's contribu-
tion or value of the services of the plaintiff during said period
should be deducted from the stipulated price of said gasoline
filling and service station."

"5. That the defendant of this stipulation is that plaintiff
took possession of the station March 1, 1940, and operated and con-

4.

trolled it for the balance of the lease which expired July 31, 1940; that after all operating costs and expenses including the cost of the "goods, wares and merchandise sold from the station" and all wages and salaries were paid by defendant there would be a profit of \$2,000. The provision in the stipulation, that defendant after it took possession, paid all wages and salaries to employees "excepting the plaintiffs" does not in any way say that defendant had not made \$2,000 profit but on the contrary it is expressly agreed that defendant did make a profit of \$2,000. Obviously defendant would not pay plaintiffs because they were not working at the station. The result of all this is that defendant wrongfully took possession of the station which prevented plaintiffs from earning \$2,000 and defendant would therefore be liable, under the law, for this sum less whatever the plaintiffs might earn from other sources during the period from March 1, to July 31, 1940.

And counsel for defendant in their brief say: "If the proper measure of damages under the facts of this case does not require a deduction of the value of the personal services of the plaintiffs from the gross profits of \$2,000.00, as contended under point III of defendant's points and authority, then there must be a deduction made, under the law, from the said \$2,000.00 for the earnings of Elliott and Epstein during the period from April 1st to July 31st, 1940;" and that the evidence shows that plaintiff, Epstein, during the period of time earned \$160 and Elliott, \$127.42, or a total of \$287.42.

While this claimed deduction was not specifically brought to the attention of the trial judge, yet we are of opinion that the deduction should be allowed. Under the circumstances the law imposed the obligation on plaintiffs to minimize the damages by any earnings they were able to receive from other sources. It follows that the \$287.42 must be deducted from the \$2,000, leaving \$1,712.58, and to this sum must be added the \$220 above mentioned,

5.

making \$1,932.58, for which sum the judgment should have been entered.

It is further contended that the court erred in admitting testimony of plaintiff, Elliott, in rebuttal. Plaintiff, Epstein, was called in rebuttal, examined and cross-examined in connection with plaintiffs' buying some tires, tubes, etc., while they were conducting the station. At the conclusion of his cross-examination, plaintiff, Elliott, who was present and heard Epstein's testimony, was called and asked if the same questions were put to him as those put to Epstein, his answers would be the same and he answered that they would. This was objected to but the objection was overruled. While we do not approve of what was done, yet we are of opinion that the finding and judgment should not be disturbed on this ground. The rebuttal testimony of Epstein was as to whether there was any violation of the lease in plaintiffs' buying a few tires, tubes, etc., from persons other than defendant and whether this had been authorized by defendant.

A further complaint is made that the court erred in refusing to admit defendant's Exhibits 18 and 20 which purported to show the comparative statement of gallonage of defendant's thirteen stations as compared with station 12, involved in the instant case, which were offered by defendant as tending to show that plaintiffs had not conducted the station properly or profitably. We think these exhibits were properly excluded. There may be a difference in the location of stations which would greatly affect the amount of business done at each station. The evidence was properly limited to station 12.

The judgment of the superior court of Cook county is reversed and the cause remanded with directions to enter judgment in favor of plaintiffs and against defendant for \$1,932.58. Each party will be required to pay its own costs in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

making \$1,000.00, for which sum the judgment should have been

entered.

It is further contended that the record shows in this

case that the plaintiff, Alice, is a resident of the State of

California, and that the defendant, John, is a resident of

the State of California, and that the parties are both

citizens of the State of California. It is also contended

that the plaintiff, Alice, was present and heard the trial

and that she was not represented by any counsel at the

trial. It is further contended that the defendant, John,

was not present at the trial and that he was not

represented by any counsel. It is also contended that

the trial was conducted in violation of the rules of

procedure, and that the judgment is void. It is further

contended that the plaintiff, Alice, was not given the

opportunity to be heard, and that the judgment is void.

It is also contended that the defendant, John, was not

given the opportunity to be heard, and that the judgment

is void. It is further contended that the trial was

conducted in violation of the rules of procedure, and

that the judgment is void. It is also contended that

the plaintiff, Alice, was not given the opportunity to

be heard, and that the judgment is void. It is further

contended that the defendant, John, was not given the

opportunity to be heard, and that the judgment is void.

It is also contended that the trial was conducted in

violation of the rules of procedure, and that the

judgment is void.

The judgment of the superior court of the county is

reversed and the cause remanded with directions to enter judgment

in favor of the plaintiff and against the defendant for \$1,000.00, with

costs to be repaid to the plaintiff in full.

WITNESSED my hand and the seal of the court this 1st day of

January, 1911, at Los Angeles, California.

42501

IN RE: ESTATE OF EDWARD J. O'HARE,
Deceased.

GEORGE REMUS,

Appellant,

v.

THE NORTHERN TRUST COMPANY, Executor
of the Estate of Edward J. O'Hare,
Deceased,

Appellee.

476
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

168
323 I.A. 71²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

George Remus filed his claim for \$196,700 in the Probate court of Cook county in the matter of the estate of Edward J. O'Hare, deceased. There was a hearing in the Probate court and December 19, 1941, an order was entered disallowing the claim. An appeal was taken to the Circuit court of Cook county where a jury was waived, the matter heard by the court and at the close of claimant's evidence on motion of counsel for the executor the court found the issues against claimant, the claim was disallowed and he prosecutes this appeal.

After the record was filed, but before the abstracts or briefs were filed in this court, counsel for the executor moved to amend the transcript of the record so as to require a deposition (which had been taken and filed when the matter was pending in the Probate court to which was attached as an exhibit the photostatic copy of the document hereinafter mentioned) to be filed in this court, as a part of the record. In support of this it appeared that the deposition, and the photostatic copy of the document were ordered impounded but in making up the record for this court counsel for claimant removed the exhibit from the deposition and filed it as a part of the record in this court and counsel contend that the deposition should be in this court for us to examine. The

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THE FOLLOWING IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS SUBMITTED TO THE SECRETARY OF THE INTERIOR.

2.

motion was made when the case was pending in another division of this court and it was reserved to the hearing. The motion must be denied. The deposition was not read in the trial court and cannot be considered here. Schmidt v. Life Assur. Soc. 376 Ill. 183.

Claimant's evidence is to the effect that he, O'Hare and other parties were engaged in the liquor business which at that time was contrary to the law and a number of criminal prosecutions followed. The evidence tends to show that July 31, 1923, O'Hare signed and delivered to claimant a written document which seems to be the basis of the claim, viz., "I, Edward J. O'Hare, agree to pay to George Remus, the sum of (\$208,200.00) Two Hundred Thousand two hundred dollars, at the rate of Ten Thousand Dollars, (\$10,000.00) each year from above date for a period of nineteen years thereafter; and the sum of \$18,200.00) Eighteen Thousand two hundred dollars on the twentieth year from above date. It is understood that no interest is to be charged.

"This agreement is evidenced by (891) eight hundred ninety one barrels of whiskey stored in the warehouse of the Jack Daniels distillery at St. Louis Missouri, certificates for which I hereby tender said George Remus as collateral security for said above amount of moneys due him. If the aforesaid amount can be paid by me before maturity I shall use my best efforts to do so.

"This agreement entered into by me, Edward J. O'Hare and George Remus, this 31st day of July 1923 at St Louis Missouri. Signed, Edward J. O'Hare."

What was claimed to be a photostatic copy of the document was offered in evidence but upon objection of counsel for the executor it was excluded.

The evidence is further to the effect that the document was executed and delivered to evidence the amount O'Hare owed Remus for the purchase of 891 barrels of whiskey which were stored in a ware-

notion was made when the case was pending in another division
of this court and is substantiated by the findings. The notion
must be denied. The suggestion that the case is still open
and cannot be considered here. United v. Little, 100, 100
111, 100.

Distinction's evidence is in the report that he, through the
other parties were engaged in the same business with the
time was necessary to the fact that a number of different transactions
followed. The evidence seems to show that in 1911, 1912,
1913 and 1914 the evidence is almost a perfect record of the
same to be the basis of the case, and the evidence is
not to say to other results, but the evidence is not
thoroughly and completely correct, as the case is not
(110,000,000) since there were some for a period of 1911
years together; and the fact of 1911, 1912, 1913, 1914, 1915
leading to the fact that the evidence is not correct. It is in
fact that no interest is to be denied.

That statement is believed by (100,000,000) and is
nearly one of the details of which is the evidence of the fact
which is believed by (100,000,000) and is believed by the fact
nearly the same as the evidence is not correct. The fact
above amount of money is 100,000,000. It is not correct and is
paid by the fact that I shall not be able to pay to the
fact that statement is believed by (100,000,000) and is
George Brown, and that of 1911, 1912, 1913, 1914, 1915, 1916.
Signed, Edward J. Brown.

That was claimed to be a hypothetical case of the document
was offered in evidence but not objection of evidence for the
evidence is not correct.
The evidence is further to the fact that the document was
expected and believed to evidence the amount of 100,000,000 for
the purpose of the details of which is not correct in a fact.

3.

house in St. Louis, together with some other property; that payments from time to time were made on the indebtedness which originally was \$208,200, until it was reduced to \$196,700 (although this amount cannot be arrived at from the figures mentioned on pages 2 and 3 in claimant's brief.) The first payment, as contended by claimant, was made November 2, 1925, and the last November 15, 1938.

The court in sustaining counsel for the executor's motion for a finding in the executor's favor, in speaking of the document of July 31, 1923, and in holding it inadmissible said: "There are many grounds; mainly because there hasn't been established to the court's satisfaction that the original is not in existence. If there is such an original, there certainly has not been any diligence used to secure the original and the further grounds, as to the existence of the original from the evidence that has been introduced that there was such an original. The court has had occasion to observe the witnesses, their manner of testifying, their demeanor and what they said and is satisfied from the evidence that has been produced that there is grave doubt in the court's mind that there is such an instrument. Mr. Montgomery [counsel for the executor]: Would your honor like to have the whole case before you? *** we think we have some rather favorable evidence." After some further discussion counsel for claimant said that since the court had sustained defendant's motion he did not "want to enter into the trial of a matter that your Honor has already decided." The court thereupon entered his finding and judgment disallowing the claim.

We think the court erred in excluding the document since there was testimony that witnesses saw O'Hare sign and deliver the document; that a number of years afterward when, the evidence tends to show, O'Hare requested the original document be given to him so that he could submit it to his lawyer who needed it in other litigation, a photostatic copy was taken and that the one offered

4.

in evidence is such a copy. And there is evidence tending to show that claimant could not locate it.

Complaint is also made by counsel for claimant that the court excluded Exhibits 15, 16 and 17 offered by him. These documents purport to be carbon copies of three letters, the first dated June 25, 1929, addressed to O'Hare and purports to be signed by claimant; the second, dated June 5, 1932, addressed to O'Hare and signed by Miss Watson, and the third dated October 12, 1932, addressed to O'Hare and purports to have been signed by the claimant. The two which appear to have been signed by Remus are to the effect that Remus is claiming O'Hare owes him money and is disappointed because it had not been paid; and the letter written by Miss Watson also suggests that Remus is looking for some money. We think these were properly excluded. There is no evidence that they referred to the claim in question or any admission that O'Hare owed Remus any money.

Counsel for claimant further say: "A showing of material facts of indebtedness having been made by the plaintiff, the Court should have held that failure on the part of the defendant to produce evidence it admittedly had in its power to refute the facts entitled the plaintiff to judgment on the presumption that the evidence if produced would operate to its prejudice." We think there is no merit in this contention. When at the close of claimant's evidence defendant moved for a finding in its favor the only evidence to be considered was that which had theretofore been introduced. There is no rule of law that we are familiar with which holds that since counsel for the executor, at the time, said he had evidence which was favorable to the estate and the evidence was not then produced, that the law raises a presumption that such evidence would be prejudicial to the estate. Moreover, the record discloses that apparently one of the reasons counsel for the estate did not offer the evidence was the

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evidence that they intended to kill him by strangling him.

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5.

fact that counsel for the claimant said the court had already decided in favor of the estate and there was no reason for any further evidence.

While as above stated, we hold that the court erred in excluding Exhibit 20, yet it must not be thought that we are agreeing or disagreeing with what the trial judge said when he decided the case, as above quoted, bearing in mind that "Courts lend a very unwilling ear to statements of what dead men have said." DeLee v. Leahy, 278 Ill. App. 178.

The judgment of the Circuit court of Cook county is reversed and the matter remanded.

REVERSED AND REMANDED.

Niemeyer, J., and Matchett, J., concur.

4. 1990年 2 月 5 日 星期一 10:00

42539

WEIGHTSTILL WOODS,
Appellant,

v.

VILLAGE OF LA GRANGE PARK, a
Municipal Corporation of Cook
County,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 72

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover for moneys paid out by him and services performed as attorney for the defendant Village. The complaint was in four counts. Defendant filed its motion to dismiss the complaint on the ground that the matter had been adjudicated and that the cause of action was barred by the Statute of Limitations (Ill. Rev. Stat., 1943, ch. 83, §15.) The motion was supported by an affidavit setting up what had taken place in prior suits brought by plaintiff for the same matter. The court denied the motion as to the first count and sustained it as to the second, third and fourth counts, the suit was dismissed as to those counts and defendant was ordered to answer the first count. Afterward plaintiff moved the court to vacate the order and later defendant Village filed its answer to the first count and filed its counterclaim which we think is unnecessary to consider. Plaintiff's motion was overruled and judgment entered in plaintiff's favor and against defendant on the first count for \$102. Plaintiff appeals from the order of court sustaining defendant's motion and dismissing the second, third and fourth counts.

In the affidavit in support of the motion to dismiss counsel for the Village set up the claim of \$8,058 of plaintiff made in the second count and that it was passed upon and disallowed

2.

except as to \$762.87 expended for costs, in Woods v. Village of La Grange Park, 299 Ill. App. 1. That after leave to appeal from that judgment was denied by the Supreme court, the mandate of this court was filed in the Clerk's office of the Superior court and an order entered on motion of counsel for the Village that the judgment be vacated and set aside and the cause dismissed "pursuant to the mandate of the Appellate court of the First District." And it was ordered that the judgment be vacated and set aside and the cause dismissed. Obviously this was not in accordance with the mandate of this court. The judgment of this court reversed the judgment of the Superior court and entered judgment in plaintiff's favor for the amount he had expended. The order should not have purported to dismiss the suit. This part of the order was a nullity. The judgment of this court was final. The matter having been adjudicated, it could not be relitigated.

The claim made by plaintiff in the third count was for expenses paid out and legal services rendered the Village at its request for which he was given a special assessment voucher issued in the special assessment proceeding which he had conducted on behalf of the Village. That afterward the ordinance under which this assessment was levied was declared by our Supreme court to be void. Gray v. Black, 338 Ill. 428, and the special assessment proceeding was abandoned by the Village without plaintiff's knowledge or consent. Plaintiff sought to recover by virtue of the provisions of section 94 of the Local Improvement Act.

The record discloses that plaintiff's claim made in this count was for the same matters involved in a claim made by him and which was decided adversely to him by this court in Woods v. Village of La Grange Park, 298 Ill. App. 595, where it was held that plaintiff could not recover; that the claim had been adjudicated and was also barred by the statute of Limitations. After the mandate was filed in the Clerk's office of the Superior court,

3.

that court entered an order pursuant to the mandate by which, among other things, it was ordered that the suit be dismissed at plaintiff's costs.

Plaintiff's theory as stated in his brief is: "that when the defendant made motion to dismiss the former suits, in trial court upon mandate from appellate court, and dismissal was entered on such motion without a hearing on the merits of complaints in former suits, such action by defendant and by the trial court, erased whatever had occurred in the prior suits. All such prior proceedings were abandoned and ended by the orders of dismissal, from which no appeal was taken." We think this contention cannot be sustained. The merits of plaintiff's claim, as set up in his second and third counts, were passed upon and cannot be relitigated. Carboni v. Bartlett, 290 Ill. App. 351. And as stated in Stoll v. Gottlieb, 305 U. S. 165: "It is just as important that there should be a place to end as that there should be a place to begin litigation."

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

that court covered an order rendered in the matter by which
before other things, it was ordered, that the said defendant
At plaintiff's costs.

Plaintiff's memory as stated in the record is: that
when the defendant was called to answer the issues, in
trial court from which the case was taken, and plaintiff was
ordered as such to answer a question as to the value of the property
in former wife, such action of defendant was in the trial court,
wherein plaintiff had appeared in the same suit. All such orders
from which were mentioned the court of the county of Alameda,
from which no appeal was taken. In which said proceeding plaintiff
be satisfied. The wife of defendant's name, as set up in the
second and third counts, was named Mary Ann Smith, nee
Carlson v. Carlson, who was married to said
Carlson, and it is set up as a fact that when the
be a place to and of said state where as a place to which it is
tion."

The judgment of the court in the above case is hereby
affirmed.

Witness my hand and seal of office.

Witness, J. J. ...

42930

BERTHA S. STROMBERG, et al.,

v.

HAROLD R. BLOMSTRAND, et al.

In the Matter of the Petition of
WILLIAM C. LIDDELL, Liquidating
Receiver,

Appellee,

v.

OSCAR TURNER,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

323 I.A. 72²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Mozart Apartments Corporation was organized under the laws of Illinois, to take title for the bondholders to premises upon which there was an outstanding trust deed issued to secure bonds to the amount of \$55,000, issued January 3, 1927. Default was made, suit to foreclose begun, decree obtained, the premises sold at Master's sale to Edwin V. Blomstrand, representing a bondholders' committee. The bondholders took stock for their bonds.

Differences arose in the course of reorganization, and suit was filed by Stromberg, et al., to liquidate the assets and the business of the corporation. Liddell was appointed liquidating receiver, and by decree entered on December 7, 1942, he was authorized to sell and convey the premises, improvements and appurtenances attached thereto, and all or any personal property owned by the corporation, "except cash". The decree directed the sale should take place December 29, 1942, at 1 o'clock P. M.; that public notice should be

42330

BETHA S. STROMBERG, et al.,

v.

HAROLD M. BLOMSTERN, et al.

In the Matter of the Petition of
WILLIAM C. LIDDELL, Plaintiff
Receiver,

Defendant,

v.

OSCAR TORRES,

Appellant.

JUSTICE WATCHETT DELIVERED THE DECREE OF THE COURT.

The Hotel Apartments Corporation was organized under the laws of Illinois, to take title for the bondholders to premises upon which there was an outstanding trust deed issued to secure bonds to the amount of \$25,000, issued January 3, 1927. Before the sale, suit to foreclose begun, decree obtained, the premises sold at auction, sale to Edwin V. Blomstern, representing a bondholders' committee. The bondholders took stock for their bonds.

Differences arose in the course of reorganization, and suit was filed by Stromberg, et al., to liquidate the assets and the business of the corporation. Liddell was appointed liquidating receiver, and by decree entered on December 7, 1942, he was authorized to sell and convey the premises, improvements and appurtenances attached thereto, and all or any personal property owned by the corporation, "except cash". The decree directed the sale should take place December 22, 1942, at 1 o'clock P. M.; that public notice should be

2.

given for three successive weeks, etc.; that any party might purchase, and thereupon the receiver should execute and deliver to the purchaser a deed of conveyance, "describing the premises and the personal property purchased, the amount paid therefor and the amount bid". This decree directed the sale be made "free and clear of the claims of all of the defendants, except the lien of existing encumbrance of record and all unpaid taxes, and that such sale should be subject to the continuing lien of existing encumbrances and unpaid taxes, and that the purchaser or purchasers at such sale should be entitled to a deed and conveyance of the said premises and said personal property, without any redemption from said sale on the part of any of the defendants or any interested party". The decree directed the receiver to report to the court for its approval, and upon approval to execute and deliver a deed to the purchaser, "subject to existing encumbrances and unpaid taxes". The creditors were directed to file claims against the Mozart Building Corporation by April 7, 1943, or be barred, and the court reserved jurisdiction for further necessary orders.

Liddell reported, March 23, 1943, that he had advertised as directed by the decree that on March 20, 1943, at 11 o'clock in the forenoon, at Room 437 in the County Building, etc., he offered the premises and personal property, as advertised, for sale at public auction to the highest and best bidder; that he received no bid other than for the whole thereof; that respondent, Turner, by attorney, bid the sum of \$4,000 in cash, "subject to the outstanding indebtedness thereon", and that being the best bid he sold the property and real estate, "together with all buildings erected thereon and all improvements and appurtenances thereunto attached, including all personal property now owned by said defendant, Mozart Apartments Corporation, a corporation". He reported \$500 was paid on the purchase price and that the purchaser was ready to pay the balance of

2.

given for three successive weeks, etc.; that any part of the purchase, and thereupon the receiver should execute and deliver to the purchaser a deed of conveyance, "describing the premises and the personal property purchased, the amount paid therefor and the amount due." This decree directed the sale to be made "free and clear of all claims of all of the defendants, except the lien of existing mortgages of record and all unpaid taxes, and that such sale should be subject to the continuing lien of existing mortgages and unpaid taxes, and that the purchaser or purchasers at such sale should be entitled to a deed and conveyance of the said premises and said personal property, without any redemption from said sale on the part of any of the defendants or any interested party. The decree directed the receiver to report to the court for its approval, and it on approval to execute and deliver a deed to the purchaser, subject to existing mortgages and unpaid taxes. The creditors were directed to file claims against the Court Building Corporation by April 7, 1943, or before, and the court reserved jurisdiction for further necessary orders.

Liddell reported, March 25, 1943, that he had advertised as directed by the decree that on March 20, 1943, at 11 o'clock in the forenoon, at room 437 in the Court Building, etc., he offered the premises and personal property, as advertised, for sale at public auction to the highest and best bidder; that he received no bid other than for the whole thereof; that respondent, Turner, by attorney, bid the sum of \$4,000 in cash, "subject to the outstanding indebtedness thereon", and that being the best bid he sold the property and real estate, "together with all buildings erected thereon and all improvements and appurtenances thereto attached, including all personal property now owned by said defendant, Court Building Corporation, a corporation." He reported \$500 was paid on the purchase price and that the purchaser was ready to pay the balance of

3.

\$3500 upon entry of a confirming order. His report was dated March 23, 1943.

Attached to his report was a certificate of publication in conformity with the provisions of the decree. It showed that the receiver offered for sale "all or any personal property now owned by said defendant, Mozart Apartments Corporation, a corporation, except cash"; also, that the property would be sold free and clear of all claims of defendants, "except the lien of existing encumbrances of record and all unpaid taxes, and that the purchaser will be entitled to a deed and conveyance of said premises and the personal property, without any redemption from sale on the part of any of the defendants or any interested party".

On April 5, 1943, an order was entered, reciting that in the absence of objections the report of the receiver was approved and confirmed, and that upon the payment by Oscar Turner of the further sum of \$3500, the receiver should execute and deliver to him a deed, "conveying the said premises subject to all unpaid general taxes and existing encumbrances of record, together with the unpaid interest thereon".

May 27, 1943, Liddell filed a petition, reciting the sale of the premises to Turner, as above set forth. He also averred that on March 20, 1943, there was of record against the premises a first mortgage for the principal sum of \$17,383.37, on which a payment of \$142.38 was due on March 24, 1943; a second mortgage for \$9500, on which there was due the sum of \$2,880 at the time of sale, and "unpaid taxes of record against said premises for the year A. D. 1942 amounting to \$980.27 and the unpaid taxes due for the months of January, February and March of 1943".

It further set up the order of April 5, 1943, approving the sale, and that the receiver on April 7, 1943, conveyed the premises to Turner, "subject to unpaid taxes, encumbrances of record and unpaid interest thereon", and that the deed had been filed for record.

3500 upon entry of a confirming order. His report was dated March 23, 1943.

Attached to his report was a certificate of publication in conformity with the provisions of the Act. It showed that the receiver offered for sale "all or any personal property now owned by said defendant, except Apartment Corporation, a corporation, except cash; also, that the property would be sold free and clear of all claims of defendants, except the lien of existing encumbrances of record and all unpaid taxes, and that the purchaser will be entitled to a deed and conveyance of said premises and the personal property, without any redemption from sale on the part of any of the defendants or any interested party."

On April 5, 1943, an order was entered, reciting that in the absence of objections the report of the receiver was approved and confirmed, and that upon the payment by Oscar Turner of the further sum of \$300, the receiver should execute and deliver to him a deed, "conveying the said premises subject to all unpaid general taxes and existing encumbrances of record, together with the unpaid interest thereon."

May 27, 1943, Liddell filed a petition, reciting the sale of the premises to Turner, as above set forth. He also averred that on March 20, 1943, there was of record against the premises first mortgage for the principal sum of \$17,383.37, on which a payment of \$142.38 was due on March 24, 1943; a second mortgage for \$2500, on which there was due the sum of \$2,680 at the time of sale, and "unpaid taxes of record against said premises for the year A. D. 1942 amounting to \$80.27 and the unpaid taxes due for the months of January, February and March of 1943."

It further set up the order of April 5, 1943, approving the sale, and that the receiver on April 7, 1943, conveyed the premises to Turner, "subject to unpaid taxes, encumbrances of record and unpaid interest thereon", and that the deed had been filed for record.

4.

The petition also recited that H. R. Blomstrand & Company, Inc., had been managing agents of the Mozart Apartments Corporation from April 5, 1937, until on or about April 7, 1943, and as such, during the months of June, July, August, September, October, November and December, 1942, and the months of January and February, 1943, made monthly payments in the sum of \$72.33 to Salk, Ward & Salk, a corporation, as deposits on account of general real estate taxes for the year 1942. These deposits amounted to \$650.97, and were advanced by H. R. Blomstrand & Company, Inc. from its private funds, in behalf of Mozart Apartments Corporation, to forestall threatened foreclosure proceedings; further, that H. R. Blomstrand & Company had filed its claim in the cause, for that amount, representing the monthly installments advanced by it on account of the Mozart corporation.

The petition then alleges that when the receiver delivered the deed to Turner, Turner accepted the title to the premises "with the understanding that he would pay in full the taxes due for the year 1942 on Mozart Apartments Corporation * * * and was fully aware of the provision contained in said deed that the same was subject to all unpaid general taxes and existing encumbrances of record"; that after the delivery and recording of the deed, H. R. Blomstrand & Company attempted to have Salk, Ward & Salk pay to it for the benefit of the receiver, these sums deposited on account of 1942 taxes, which Salk, Ward & Salk would not do; in fact, that it would not pay over either to H. R. Blomstrand & Company or to the receiver these sums, but would retain the same until such time as a receipted bill for taxes on the premises for the year 1942 was presented, or until the unpaid balance due for taxes was deposited with it.

The petition says that Turner learned of this action, advised the receiver he would not from his own funds pay in full the 1942 tax bill but intended to claim the benefit of the monthly deposits made by H. R. Blomstrand & Company on behalf of Mozart Apartments

The petition also recited that H. R. Blomstrand & Company, Inc., had been managing agents of the Mozart Apartments Corporation from April 6, 1937, until on or about April 7, 1942, and as such, during the months of June, July, August, September, October, November and December, 1942, and the months of January and February, 1943, made monthly payments in the sum of \$2.35 to Salk, Ward & Salk, a corporation, as deposits on account of general real estate taxes for the year 1942. These deposits amounted to \$660.97, and were advanced by H. R. Blomstrand & Company, Inc. from its private funds, in behalf of Mozart Apartments Corporation, to forestall threatened foreclosure proceedings; further, that H. R. Blomstrand & Company had filed its claim in the case, for that amount, representing the monthly installments advanced by it on account of the Mozart Corporation.

The petition then alleges that when the receiver delivered the deed to Turner, Turner accepted the title to the premises "with the understanding that he would pay in full the taxes due for the year 1942 on Mozart Apartments Corporation * * * and was fully aware of the provision contained in said deed that the same was subject to all unpaid general taxes and existing encumbrances of record"; that after the delivery and recording of the deed, H. R. Blomstrand & Company attempted to have Salk, Ward & Salk pay to it for the benefit of the receiver, these sums deposited on account of 1942 taxes, which Salk, Ward & Salk would not do; in fact, that it would not pay over either to H. R. Blomstrand & Company or to the receiver these sums, but would retain the same until such time as a receipted bill for taxes on the premises for the year 1942 was presented, or until the unpaid balance due for taxes was deposited with it.

The petition says that Turner learned of this action, advised the receiver he would not from his own funds pay in full the 1942 tax bill but intended to claim the benefit of the monthly deposits made by H. R. Blomstrand & Company on behalf of Mozart Apartments

5.

Corporation. The petition of receiver said that to permit Oscar Turner to claim the benefit of these deposits would be inequitable and unjust to the stockholders and creditors of Mozart Apartments Corporation.

The petition also averred that under the order of the court, the terms of the deed, etc., Turner was not entitled to the benefit of the monthly tax deposits. The petition prayed for an order directing Oscar Turner to pay to the receiver within a short date the sum of \$650.97, to be retained by him subject to the order of the court.

Turner answered the petition, admitting the purchase of assets subject to the mortgage; said he did not know the amount of taxes assessed against the premises for 1942, and that in assuming encumbrances he examined the records, found it was provided by the terms of the first mortgage that the mortgagor should pay, as tax deposits, \$72.33 per month, simultaneously and as part of the monthly installments paid against the principal debt and interest; that these deposits were required by the mortgage; that he (Turner) relied on these mortgage deposits in making his bid; that failure to make these deposits against taxes, under the terms of the mortgage, would constitute a default to the same extent as a failure to pay the principal debt or interest; that he relied on the record and obtained from the mortgage holder a statement as to the amount of money deposited thereunder in making his bid to the receiver; that the tax deposits were in the nature of payments of part of installments due, and to deprive him of the benefits thereof would deprive him of his rights on the record.

He also said that if Blomstrand & Company advanced any money to the Mozart Apartments Corporation, by making these deposits or otherwise, the claim of the company was properly against the Mozart Apartments Corporation, and the rights of the company against the corporation would in no way affect the standing of the purchaser,

corporation. The petition of respondent was filed to prevent
any further action on the part of the corporation in the
subject of the above named and captioned cause.
Respondent.

The petition was returned and filed. The order of the court
in the case of the said, was, that the petition be dismissed
of the court, and the petition be dismissed. The petition was
directed to the court to pay to the respondent the sum of
the sum of \$100.00, to be retained by the court to the use of
the court.

There is no other petition, and the petition of the
subject to the court; and the court has not yet
advised against the petition for the sum of \$100.00.
The petition is dismissed, and the petition is dismissed.
of the first petition, and the petition is dismissed.
petition, \$100.00 per month, and the petition is dismissed.
petition is dismissed, and the petition is dismissed.
deposits were required to be made; and the petition is dismissed.
the petition is dismissed, and the petition is dismissed.
deposits against the petition, and the petition is dismissed.
petition is dismissed, and the petition is dismissed.
claim of the petition, and the petition is dismissed.
from the petition, and the petition is dismissed.
petition is dismissed, and the petition is dismissed.
deposits were in the hands of the petition, and the petition is dismissed.
and to deprive him of the benefits of the petition, and the petition is dismissed.
petition, and the petition is dismissed.

to the court, and the petition is dismissed.
petition, and the petition is dismissed.
petition, and the petition is dismissed.
petition, and the petition is dismissed.
petition, and the petition is dismissed.

6.

whose rights were fixed by the terms of the sale, pursuant to the order of the court, and by the state of the title records.

Respondent also stated that he relied on the decree of the court; that the receiver offered the property pursuant to the decree, including all personal or real property of the corporation, "except cash"; that the publication of the sale conformed to the provisions of the decree; that respondent and receiver were both acting under the terms of the decree, and that through the sale he has acquired all the assets of the corporation, of every type and description, with the exception of cash; that the credits on the books of the mortgagee, or its agents, constituted one of the assets of the corporation purchased by him. He denied there was any understanding to the contrary, that he would pay the taxes in full for the year 1942, and denied he, at any time, agreed to pay taxes except by way of continuation of the monthly deposits required by the mortgage.

The receiver replied that Turner had full and complete knowledge of taxes assessed for the year 1942; that this was stated twice publicly during the sale; denied Turner relied on the terms of the mortgage; said he did not rely upon any statement obtained from the holder thereof in making his bid, and denied that to deprive Turner of the benefit of the tax deposits would deprive him of his rights as they appeared of record, but on the contrary stated that the purchaser made his bid at the sale with a full understanding that he would assume in full, from his own funds, the taxes for 1942 and thereafter, and that he had no right to claim credit for any tax deposits. The receiver also averred the rights of Blomstrand & Company against Mozart Apartments Company had no bearing on the rights of Turner to the tax deposits, for the reason that Turner, in bidding, did so with full understanding that he would assume the taxes for the year 1942 and thereafter, and claim no credit therefor; ^{further} that the receiver sold and Turner purchased the premises subject to unpaid taxes for the year 1942 and thereafter, and that the same were not

[illegible]

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

10. The Commission has also received information from the Government of the Republic of the Philippines that the Government has been providing training to the Philippine National Police (PNP) in the use of force, including the use of firearms, and that the PNP has been conducting operations in the area of the conflict.

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and the other two are in the same position as the first two.

1. The first part of the report is a general introduction to the project, which includes the purpose, objectives, and scope of the study.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

It is noted that the above information was obtained from the files of the FBI, and that the information was obtained from the files of the FBI, and that the information was obtained from the files of the FBI.

REMARKS; MADE ON THE LAST DAY OF MY VISIT TO THE
HOSPITAL DURING THE WEEK; BEING A SUMMARY OF THE

1. The first of these is the fact that the majority of the population of the United States is of European descent, and the majority of the population of the United Kingdom is of European descent. This is a fact which is of great importance in the study of the history of the United States and the United Kingdom, and it is a fact which is of great importance in the study of the history of the United States and the United Kingdom.

1. The first group of people who are not in the majority are the people who are not in the majority.

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved.

[illegible]

It is also noted that the above information was obtained from the files of the FBI, New York Office, dated 10-18-67.

Further

Too wide - make 40% shall and 10% shall and 50% shall

7.

sold with any understanding that Turner was to have any right in and to the tax deposits listed as credits on the books of the mortgagee; that the question arose at the time of the execution and delivery of the deed as to the payment of 1942 taxes, and it was orally agreed at that time the purchaser would pay same in full from his own funds and take no credit from any tax deposits made with the mortgagee, and that H. R. Blomstrand & Company was to receive from the mortgagee a check for the amount deposited by it.

The court, after hearing the evidence on the issues of fact, entered the order appealed from.

"It is ordered that the sum of \$650.97 heretofore deposited on account of taxes by H.R. Blomstrand & Company, Inc., a corporation, in behalf of Mozart Apartments Corporation, a corporation, with Salk, Ward & Salk, Inc., a corporation, as agent of Mutual Trust Life Insurance Company, a corporation, of Chicago, Illinois, be not expended in payment of any part of the taxes levied and assessed against the premises here involved for the year 1942.

"It is further ordered that Oscar Turner, the purchaser at the sale of the premises here involved, be allowed no credit, title or interest in and to the sum of \$650.97 heretofore deposited on account of taxes by H. R. Blomstrand & Company, Inc., a corporation, in behalf of Mozart Apartments Corporation, a corporation, with Salk, Ward & Salk, Inc., a corporation, Agent of Mutual Trust Life Insurance Company, a corporation, of Chicago, Illinois, unless he within seven days of the date hereof shall have paid over to William C. Liddell, Liquidating Receiver herein, the sum of \$650.97."

It is clear the trial judge did not accept the evidence of either Turner or his witnesses as to what was said at the time of the sale. We do not think, as a matter of law, it makes much difference. The decree, the notice, the report of sale, the order approving it and directing the deed to issue, are all to the effect that Turner was to take the title subject to the encumbrances and taxes of record. What difference does it make what anybody said about it in view of the record? If there was any

8.

objection to the sale it could have been made on the application to approve the Receivers report or objection or motion to modify the deed which the receiver was directed to make and deliver. At no stage of the proceeding does it appear that the purchaser agreed to assume and pay anything except the amount which he bid. The receiver cites Watt v. Cecil, 314 Ill. App. 274; Chandler v. Morey, 195 Ill. 596, 606, and Andrews v. O'Mahoney, 112 N. Y. 567, all to the effect that a purchaser, at a judicial sale, becomes subject to the jurisdiction of the court to the extent that his bid can be enforced in a summary proceeding. This is not questioned, but none of these cases hold that under such circumstances the court has jurisdiction to compel specific performance of contracts alleged to have been made between the purchaser and others who are not parties to the suit with reference to the premises purchased. The order will be reversed.

REVERSED.

Niemeyer, J., concurs.

MR. Presiding Justice O'Connor dissenting:

The first paragraph of the order appealed from, above quoted, should be affirmed. Turner is not entitled to the money. The second paragraph requires the doing of a useless act.

42448

THE TRUST COMPANY OF CHICAGO,
a corporation, Administrator of
the Estate of Florence D. Steven,
Deceased,

Appellant,

v.

SUTHERLAND HOTEL COMPANY, a
corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

323 I.A. 73

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, administrator of the estate of Florence D. Steven, deceased, appeals from a judgment entered against it upon a directed verdict in an action for the wrongful death of decedent. She, with her husband and 22 months old boy, was living at the Sutherland Hotel; the child entered an unguarded and open elevator, which started to ascend, and in attempting to rescue him decedent received injuries from which she died.

In its answer, filed within six months of the date of the accident - June 29, 1940, defendant denied the allegations of the complaint that it "possessed, owned, operated and controlled a certain building as a hotel, known as the Sutherland Hotel," and "owned, maintained, operated and controlled a certain passenger elevator in said hotel, for the benefit of guests, tenants and invitees of said defendant." It does not appear any depositions for discovery as to these matters were taken.

Plaintiff's evidence was limited to showing that the name Sutherland Hotel appeared on the building and that the records of the Building Department of the City of Chicago of inspection of the elevator showed the Sutherland Hotel as the owner. The trial court sustained objections to certain receipts for rent covering the period 1938 to 1941, marked "Sutherland Hotel" at the top, some

THE UNIVERSITY OF CHICAGO

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...and your mother would be proud of you.

to receive no further aid and no reserve for the fire.

[illegible]

1. The only person who can be held liable for the actions of the corporation is the person who is the owner of the corporation.

... and the

2.

of which were signed by E. Kafkie. Objection was also sustained to the introduction of the return of the sheriff showing service of the summons on the defendant by leaving a copy with E. Kafkie, its agent. These rulings were proper. Whether Kafkie was agent of the defendant was a question of fact, and the statements of the sheriff in his return did not tend to prove or disprove it.

Lewis v. West Side Tr. & Sav. Bank, 377 Ill. 384.

The uncontradicted evidence of defendant showed that in 1935 the Sutherland Hotel Building Corporation floated a bond issue upon the premises in which the accident occurred; the corporation defaulted; on the sale in a foreclosure proceeding the successor-trustees bought the property and conveyed it to the defendant Sutherland Hotel Company, a corporation organized for the benefit of the bondholders, who were given certificates of beneficial interest; that shortly thereafter, on December 3, 1937, defendant leased the premises to E. W. Bareuther, then an officer of defendant, from January 1938 to December 1942; he was well known in hotel operation and management and was a man of financial responsibility; with the assent of the defendant this lease was assigned to the 4659 Drexel Corporation, of which Bareuther was president; under this lease the lessee was obligated to maintain and care for the elevators in the building; the lease was canceled March 1, 1940 and a new lease executed, with Bareuther as lessee, running from that date to the end of December, 1949; on the same day this lease was assigned, with the assent of the lessor, to the Drexel Corporation; neither of these leases was received in evidence, but the secretary of defendant, a lawyer, was permitted to testify without objection to certain provisions of the leases. Under each lease defendant received a fixed rental and ^apercentage of the gross profits of the hotel business

[illegible][illegible]

3.

over and above a certain amount. There was also a provision for reduction of the rent if gross profits did not reach a stated sum. The secretary further testified that none of the officers or directors of the Drexel Corporation were officers or directors of the defendant; that defendant did not manage or control the premises or operate the elevators located at the Sutherland Hotel after December 1937; that it did not have any employees working about the premises and that E. Kafkie, on whom the summons had been served, was not employed by the defendant at the hotel. At the close of all the evidence the court directed a verdict for defendant, telling the jury that plaintiff had failed to offer sufficient evidence on the questions of management, control and operation of the hotel.

The question of plaintiff's contributory negligence is discussed in the briefs, but it appears from the evidence, without detailing it, that this was a question for the jury. Under the pleadings the burden rested upon plaintiff to prove that the defendant was managing, controlling and operating the hotel. The record is wholly lacking in any evidence tending to prove that fact. No inference can be drawn from the name "Sutherland Hotel" on the building or on the receipts offered. The case of Fitzpatrick v. Pitcairn, 371 Ill. 203, is determinative of the question.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

Matchett, J., dissents:

I cannot concur in this result. It seems to me that under the pleadings the matter of control and operation of the elevator should have been regarded as admitted by defendant. There was no specific denial of control or operation and the general issue, as I understand it, is no longer sufficient. Ill. Civil Practice Act

140 (1), (2), (3), (4), (5) and (6). I think, but I am not sure, that the following should be added in evidence:

42508

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., OSCAR NELSON, et al.,

~~Appellees,~~

v.

NORTHERN TRUST & SAVINGS BANK, et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

On Appeal of OTTO C. WOERTER, Receiver
of NORTHWESTERN TRUST & SAVINGS BANK,
from finding on Intervening Petition of
JOHN N. BUDZBAN, Receiver, NORTHWESTERN
SECURITIES COMPANY.

323 I.A. 24

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Budzban, Receiver for the Northwestern Securities Company was allowed to intervene in the main bank liquidation proceedings and succeeded in obtaining an order of court for payment to the Company of \$4,314.03, including as a preferred payment \$1,346.64, balance in its Property Management Account maintained at the Bank before its closing. The Bank receiver has appealed from the order, contending that the court erred in ordering payment of the Management Account balance as a preferred claim and in refusing to allow a set-off in his favor against the full payment ordered.

When both were solvent, the Bank loaned the Company \$110,000 on two promissory notes, each in the sum of \$55,000 and, to secure their payment, the Company pledged certain real estate mortgages and other securities. Interest on some securities and income from, and proceeds of the sales of, pledged real estate, reduced to possession through foreclosure, was collected by the Bank receiver and applied on the notes. When the Bank was closed the Company owned two accounts therein, a general account of \$21,664.92, which was also applied upon the notes, and the Management Account of \$27,512.48, consisting of deposits to the credit of owners of real estate for whom the Company was acting as trustee or managing agent.

The notes were paid in full, but an accounting showed the Company had been overcharged in interest both upon the notes and upon certain advancements made by the Bank receiver, from R. F. C. Loans, to protect the real estate secured. The court ordered payment to the Company of the overcharges and no complaint is made on that item.

The Management Account was reduced from \$27,512.48 to the balance of \$1,346.84, through the action of a prior Bank receiver who set off moneys, in the account, belonging to Bank debtors, against the debts. The balance in the account, it is agreed, was collected from real estate owned by Budzban, receiver. The bank receiver contends the Management Account was a general, not a special account, and that the Company is entitled to share only in dividends paid the general creditors of the Bank. He admits that owners of more than \$25,000 in the Fund, were treated as preferred claimants, since he admits that his predecessor credited those owners with the full amount of their money in the account, and further although 50% of the dividends have been paid to general creditors of the Bank, no dividend, related to the Management Account, has been paid to Budzban, Receiver. Budzban says that the Bank receiver is estopped by these actions from assuming his present inconsistent position that though the other owners of funds in the same account were preferred creditors as to that account, Budzban, receiver, is a general creditor. No reply brief was filed by the Bank receiver. In view of these considerations, and from the nature of the deposit, we find no merit in the Bank receiver's contention.

One of the Bank's assets consisted of \$3,400 in 6% collateral lien notes issued by the Company when it and the Bank were solvent. These notes were secured by trust indentures, in which real estate mortgages, equal in par value to the notes, were pledged. These trusts are being liquidated in Circuit and Superior Court receiverships and, at the time of the entry of the order, September 1, 1942, dividends

from those receiverships had reduced the notes to \$2,845.00. In his answer to the instant intervening petition, the Bank receiver claimed the right to set-off the unpaid balance on the collateral lien notes, by virtue of a clause in the promissory notes which provides that as further security for the notes, "and such other obligations, etc." then in its possession, the bank had the right of set-off and was authorized to apply "any balances, credits, deposits, accounts, moneys, etc." of the Company in possession or control of the bank to the payment of "this note or any other obligation, etc."

The collateral lien notes were not pledged to secure payment of the promissory notes. The Bank receiver had the burden of establishing the foundation for the set-off, and that burden included establishing his claim as preferable, over the general creditors of the insolvent Company, after having received as a general creditor on the claim, \$940 in dividends. The promissory notes including the clause relied on were paid in full and all rights thereunder in favor of the promisee Bank extinguished. There was no basis, therefore, when the hearing was had upon which to make the set-off and no showing of any preferable position for the claim. No error of court appears in the record and none has been shown by the Bank receiver's brief and the order of court is, accordingly, affirmed.

AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

from those provisions, and except the note to \$2,840.00. In
his answer to the instant interrogatory, the bank receiver
claimed the right to set-off the credit balance on the collected
lien notes, by virtue of a clause in the promissory notes which
provided that the further security for the notes, "and upon other
obligations, etc." then in the possession, the bank had the right
of set-off and was authorized to apply "any balance, credits,
deposits, accounts, monies, etc." of the Company in payment or
satisfaction of the debt to the payment of "this note or any other
obligation, etc."

The collected lien notes were not alleged to constitute
part of the promissory notes. The bank receiver had the lien at
establishing the foundation for the set-off, and that basis included
establishing the claim as a set-off, over the general condition
of the instant Company, after having treated as a general condition
on the claim, \$2,840 in dividends. The promissory notes including the
clauses relied on were said in full and all of the provisions in favor
of the Company were established. There was no issue, therefore,
when the hearing was had upon which to make the set-off and no showing
of any equitable position for the claim. No issue is made apparent
in the record and none has been shown by the bank receiver's answer
and the order of court is, accordingly, affirmed.

APPROVED

HEBEL, P. J. AND BURKE, J. CONCUR.

42463

WESTERN PICTURE FRAME COMPANY,
a corporation,

Appellant,

v.

WILLIAM TUCHIN,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

323 I.A. 25

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Western Picture Frame Company brought suit to recover a balance claimed to be due from William Tuchin, one of its salesmen. Trial by the court without a jury resulted in a finding and judgment for defendant, from which plaintiff has taken an appeal.

There is substantially no dispute as to the salient facts. For approximately eleven years prior to October 16, 1939, William Tuchin was employed as a salesman by plaintiff corporation, which is engaged in the manufacture and sale of furniture at wholesale. During the entire period of his employment Tuchin worked on a strictly commission basis; he had no drawing account nor did he receive any regular or fixed advances. In 1938 and 1939 and until he voluntarily terminated the employment, Tuchin frequently requested and received from plaintiff sums of money varying in amount from \$25 to \$100. He was paid weekly on the basis of shipments made to his customers during the preceding week. When furniture was shipped, a copy of the invoice was filed for the salesman who negotiated the sale, and at the end of the week a statement of shipments for that week was made up from the copies of the invoices, and the individual salesman's commission was computed on such statement. Thereafter a copy was delivered to the salesman and the original retained in plaintiff's files. Upon trial it was stipulated by the respective counsel "that the plaintiff prepared and delivered to the defendant each week a statement showing shipments made to

WESTERN UNION TELEPHONE COMPANY
 v.
 WILLIAM THOMAS
 Plaintiff
 Defendant

THE FOLLOWING VERIFICATION was made by me, JAMES H. HARRIS, Clerk of the Court, on the 10th day of May, 1939, at the City of Chicago, Illinois, in and to the effect that the within and foregoing is a true and correct copy of the original of the within and foregoing as the same appears in the records of the Court.

There is submitted to the Court the following facts for your consideration: That on or about the 1st day of May, 1939, William Thomas was employed by Plaintiff as a salesman in the territory and sale of corporation, which is engaged in the manufacture and sale of telephone equipment. During the entire period of his employment Thomas worked on a strictly commission basis; he had no drawing account nor did he receive any salary or fixed advances. In 1938 and 1939 and until he voluntarily terminated the employment, Thomas frequently requested and received from Plaintiff sums of money varying in amount from \$25 to \$100. He was paid weekly on the basis of shipments made to his customers during the preceding week. When shipment was shipped, a copy of the invoice was filed for the salesman who negotiated the sale, and at the end of the week a statement of shipments for that week was made up from the copies of the invoices, and the individual salesman's commission was computed on such statement. Thereafter a copy was delivered to the salesman and the original retained in Plaintiff's files. Upon trial it was stipulated by the respective counsel "that the Plaintiff prepared and delivered to the defendant each week a statement showing shipments made to

customers of the defendant for that week, the commissions and charges against those commissions for each week during which the defendant was in the employ of the plaintiff and for several weeks thereafter," and statements for the weeks ending January 7, 1938 through December 22, 1939 were received in evidence; for the purpose of simplifying the record, ten of those statements were selected as representative copies, all of which showed, in one form or another, the balance alleged to be due from defendant to plaintiff at the end of each week. Defendant admits that he received these statements regularly and never complained about any of them. A ledger account was kept by plaintiff in the regular course of its business, showing that when the employment was terminated defendant was indebted to plaintiff in the sum of \$475.93. At the end of 1938 defendant had become indebted to his employer in the sum of \$523, and at that time his father-in-law voluntarily paid up that balance. Thereafter defendant remained in plaintiff's employ and continued to request and receive advances as theretofore. Subsequently in 1939 Edward F. Novak, plaintiff's office manager, had a conversation with defendant relative to the sums theretofore advanced, at which the parties agreed that instead of defendant's paying lump sums weekly by having them deducted from his check, the company was to withhold 25 per cent of each commission check to apply on the running account, and pursuant to the agreement then made, 25 per cent of defendant's commissions were deducted each week until October 1939, when defendant resigned his position as salesman and the employment terminated. Herman Altman, president of the plaintiff corporation, testified without contradiction that Tuchin came into his office in October 1939, advised Altman that he was going into business for himself, "that whatever he owed us he would pay," and although "he could not pay then, *** he would pay on the installment plan every week." Defendant does not dispute the amount of

\$475.93, nor does he claim that he ever paid this balance after he left plaintiff's employment.

When called as a witness by plaintiff pursuant to section 60 of the Civil Practice Act, Tuchin admitted the weekly receipt showing commissions earned by him, and stated that he "never complained about them," and that on the statements received by him every week up to October 16, 1939, there was shown a balance due and owing to the company. The following examination then ensued: "Q. So you knew you owed the company money? A. Yes, sir. THE COURT: You mean to say that you knew you owed the company money? A. Well, at the time I left, I sold merchandise against what the company claimed they advanced to me. Q. I asked you whether you did or did not owe the company any money? A. I knew that there was a balance; how much, I didn't know at the time. THE COURT: A balance due the company? THE WITNESS: On advances, yes, sir. Q. A balance due the company? A. Yes, sir."

Defendant takes the position that the sums received by him from time to time constituted advances on commissions to be earned; that there was never any agreement or liability on Tuchin's part to repay the same, and that it was the intention of the parties that the only fund the company could look to for repayments was the commissions to be earned in the future. In support of this contention plaintiff cites and relies upon decisions in other states and in Illinois purporting to hold "that an express promise or liability must be shown before advances paid in excess of commissions earned can be recovered by the employer or master." None of the cases cited by defendant, except one to which we shall later refer, is analogous to the case at bar. Everyone of the authorities cited deals with contracts for a drawing account to be charged against commissions. Thus, Schlesinger v. Burland et al., 85 N. Y. S.

4475.93, nor does he claim that he ever held a license after
he left Kentucky's employment.

When called at a dinner by Vincent's friend to see
one of the rival parties, Vincent was there, and
knowing something about it, and stated that he never
completed about that," and that on the afternoon received by
him very much up to October 10, 1911, there was some a license
and owing to the company. The following conversation then
ensued: "Q. Do you know how and the company bought it, was
it, the company? For some time but you know you were the
company, wasn't it? Well, as far as I know, I sold some
license that the company bought they returned to me, Q. I
asked you whether you did or did not see the company and money,
I know that there was a license; and now, I think that was
the time, the company, a license and the company, the company;
on advances, yes, sir, Q. A license and the company, A. Yes,
sir."

Defendant takes the position that the facts relative to
his trip to the defendant's residence on October 10, 1911, to
earn; that there was never any agreement or license on
Vincent's part to pay the same, and that it was the intention
of the parties that the only thing the company would have to
negotiate was the question to be asked in the future, the
same out of this conversation, Vincent's side and other side
decisions in other cases and in Vincent's position to hold
"that an express license is absolutely held by Vincent and his
various and in respect of conditions and the company
of the company or matter." One of the other sides, A. Yes,
Vincent, except one to which he shall later refer, is relative
to the same as far, Vincent of the defendant's side holds
with Vincent for a license and to be changed without
conditions, and, Vincent v. Vincent, A. Yes, Q. Yes.

350, from which defendant quotes, involved a written contract for advances to be charged against commissions, and on the basis of that contract the reviewing court affirmed the trial court's action in dismissing defendants' counterclaim alleging that they had advanced to plaintiff a sum of money in excess of the amount of plaintiff's commissions. In Nelson v. American Business Bureau, 241 Ill. App. 432, the court held that the plaintiff was entitled to stipulated weekly advances as provided by his written contract notwithstanding the fact that they exceeded his commissions, because it construed the advances as guaranties and in the nature of "salary." In Felsenthal Brothers v. Gradwohl, 217 Ill. App. 170, the court observed that the question resolved itself into an interpretation of the contract entered into by the parties, which "expressly provided that the expense account and the drawing account 'is to be charged against me, and to be deducted from profits that I make on the merchandise that I sell for them,'" and the court held that where the expenses or drawing account exceeded the commission, no recovery could be had. In Kane v. Auto-Laks Manufacturing Co., 172 N. Y. S. 275, the court laid down the rule that in the event commissions earned do not equal the amount of advances made, an express promise to repay is essential to a recovery; but the rule in that case was limited to contracts of employment containing provisions for payments from time to time of fixed sums on account of or as advances against commissions to be earned. In the case at bar there was no contract for employment of the nature stated in the Auto-Laks case.

St. Anthony Motor Co. v. Patterson, 175 Minn. 624, 221 N. W. 719, cited by plaintiff, is also relied on by defendant. That case is more nearly in point than any other decision to which our attention has been called, and defendant's counsel characterize it as strikingly similar on the facts to the case

350, from which defendant received a written contract for advances of \$100,000.00. Defendant, on the basis of that contract, the plaintiff, defendant, alleging that they had advanced to plaintiff a sum of money in excess of the amount of plaintiff's obligations, in fact on 7, 1934, Plaintiff v. Defendant, 111 Ill. App. 2d, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

at bar. By the same token, it is also unlike any of the other cases which defendant has cited. The decision is not reported in full, but it appears from the abstract thereof that defendant was in the employ of plaintiff as an automobile salesman from 1922 until 1926 under an agreement by which he was to receive as compensation specified commissions on the sales which he made. During the first summer he drew his commissions as he earned them and received no advances on commissions prior to the time they had been earned. In the winter when business was slack and commissions were few, an arrangement was made by which the salesman was allowed to draw advances against commissions to be earned thereafter. An account was kept in which he was charged with these advances as they were made and credited with the commissions as they were earned, and a statement of the account was furnished him at the end of each month. This arrangement continued until the termination of his service, at which time the advances previously made were several hundred dollars in excess of the commissions earned. Plaintiff sued for this excess and the court directed judgment therefor, which was affirmed on appeal. The court, quoting from 39 C. J. 153, said: "Where the contract of employment provides for advances to the employe, to be charged to, and deducted from, the commissions agreed to be paid to him as the same may accrue, the employer may recover back any excess of advances over the commissions earned, if there is an express or implied agreement to repay such excess. *** In the absence of either an express or implied agreement or promise to repay such excess, the employer has no remedy against the employe, even though the contract in terms provides that there shall be settlements between them monthly." The court made an express finding that the defendant agreed to repay the advances, and said that an examination of the record disclosed ample evidence to sustain that finding. The case at

bar is similar to the Patterson case in many respects. The Minnesota court sustained the judgment for plaintiff under an express finding that defendant had agreed to pay the advances. We likewise hold for plaintiff in the case at bar, for the following reasons: Defendant continuously recognized and admitted the existence of a debt by accepting without complaint the weekly statements showing a balance due plaintiff. In 1938 when the balance exceeded \$500, defendant's father-in-law, with defendant's full knowledge and consent, liquidated the account by paying the full amount then due, thus indicating that defendant recognized the indebtedness. When asked by plaintiff's counsel whether at the time of the termination of his employment he knew there was a balance due the company, defendant answered in the affirmative. The trial judge was apparently startled at the answer, and when the question was repeated, defendant made the same reply. These circumstances indicate that defendant had impliedly agreed to repay the sums borrowed in excess of commissions earned, that he recognized his indebtedness to plaintiff, and that at the termination of his employment he expressly promised Altman that he would pay what he owed. The advances were always treated as loans and must be considered as such.

The judgment of the Municipal court is therefore reversed, and since there is no dispute as to the facts, judgment is entered here in favor of plaintiff in the amount of \$475.93 and costs.

JUDGMENT REVERSED AND
JUDGMENT HERE FOR PLAINTIFF.

Scanlan and Sullivan, JJ., concur.

42909

LOUIS HOLTZMAN, d/b/a Tower
Currency Exchange,

Appellee,

v.

JULIUS L. GOODMAN,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

329 I.A. 216

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Louis Holtzman, doing business as Tower Currency Exchange, brought an action in forcible detainer against defendant, Julius Goodman, to secure possession of the front 14 feet of a store located at 2603 Wentworth avenue, Chicago. The cause was tried by the court without a jury, and resulted in a finding and judgment that plaintiff was entitled to possession of the premises. Defendant has taken an appeal.

It appears that Bruno Roti, as landlord, had leased the space to Goodman June 5, 1939 for a term expiring June 30, 1941. The written indenture of lease contained an option for two more years at a monthly rental of \$40, which Goodman exercised, thereby extending the term to June 30, 1943. The premises were used by him in operating a currency exchange in partnership with his brother, Sigmund Goodman, and Morris Kurland.

Early in June 1943 Goodman and his brother Sigmund went to Roti's office to discuss a renewal of the lease. Dominick Gironda, Roti's son-in-law, was present at the discussion. Roti offered defendant a lease for any period that Goodman desired, up to five years. Goodman wanted additional space, and that question, as well as the monthly rental to be paid, was discussed. Roti suggested that Goodman take the entire store, but insisted that the new rental would have to be \$60 instead of \$40, as it had been under the old lease. Defendant wanted only an additional ten or fifteen feet and was unwilling to pay more than \$50. No agreement was reached, and as the parties left, Roti told Goodman he would be willing to give ^{him} a lease at \$60 a month

JOHN J. HODGES, Plaintiff,
vs.
JOHN J. HODGES, Defendant.

Defendant has taken an appeal.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.

It appears that John Hodges, as Plaintiff, has taken the
appeal to the court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.

It is in the year 1941, John Hodges, as Plaintiff, has taken the
appeal to the court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.
The court without a jury, the plaintiff is entitled to possession of the premises.

whenever he was ready to pay that amount.

Goodman contends, and he and his brother testified, that after the parties had failed to agree on the terms of a written lease Gironda, in Roti's presence, proposed a month-to-month tenancy, to which Roti made no reply at the time, but as the parties were leaving Roti said, "Let it go the way it is." Both Roti and Gironda deny that such a statement was made.

Subsequently on June 11, Roti served notice of termination of the tenancy on Goodman, notifying him to quit and deliver up the premises "at the end of the present term, provided 10 days intervene, otherwise at the end of the monthly term, which commences next after the service of this notice." On June 14 Kurland came to Roti's office, told him that he was prepared to sign the lease at the price asked, but was told by Roti that it was too late. June 30 Roti served another notice on defendant demanding immediate possession of the premises, and followed that with still another notice, to the same effect, on July 1, 1943.

In the interim, on June 11, 1943 Roti leased the same space to Holtzman for a term of five years commencing July 1, 1943 at a monthly rental of \$65. At the same time Holtzman gave Roti \$390 advance rent. On the receipt evidencing this payment a line appears to have been drawn through the words "From time of possession." The forcible entry and detainer proceeding was instituted by plaintiff July 7, 1943 without serving any prior notice or demand on defendant.

Goodman contends that the court erred in refusing to find that a month-to-month tenancy had been agreed upon at the first meeting in June 1943, and he argues that if such a tenancy existed, it could not be terminated except by proper notice under chapter 80, sections 6 or 12, Illinois Revised Statutes 1943. The evidence with respect to the purported month-to-month tenancy is extremely scant. Goodman predicates his claim of such an agree-

whenever he was ready to pay that amount.

According to the report, the defendant had been in the possession of the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business. The defendant had been using the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business. The defendant had been using the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business.

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In the interim, on June 11, 1943, the defendant had been using the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business. The defendant had been using the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business. The defendant had been using the property for some time, and he had been using it for his own purposes. He had also been using it for the purposes of his business.

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ment on the suggestion alleged to have been made by Gironda, that a month-to-month tenancy be entered into, and Roti's statement to "Let it go the way it is." While interrogating Gironda on this point defendant's counsel propounded the question, "Did you hear Mr. Roti say, 'Well, we will let it go at that,' or 'Let it go the way it is now?'" to which Gironda replied, "No, sir, Mr. Roti said, 'You will have to get out and not sign a lease.'" The events following the first conference between the parties in June, indicate that neither Goodman nor his brother believed they had a month-to-month tenancy. Certainly Roti entertained no such idea, for about a week after that conference he served notice of termination on Goodman and followed that up by renting the space to Holtzman. It appears from Kurland's testimony that when Goodman received the notice to quit, he realized that he could not obtain the premises at \$50 a month and forthwith sent Kurland over to sign a lease on Roti's terms. Kurland testified that "We wanted to sign the lease at the price he was asking for five years. The Goodmans told me that we were going to get a lease for five years. The partnership was to sign the lease. The price was \$60." If a month-to-month tenancy had been agreed upon June 3 it seems strange, indeed, that Kurland should have been delegated a few days later to enter into a written lease on behalf of the partnership at a higher rental. Goodman and his associates had evidently changed their minds and sent Kurland to Roti's office on June 14, with authority to sign the lease, but he was too late, because the premises had already been leased to Holtzman. Plaintiff's counsel suggest that in trying to drive too hard a bargain with Roti and after receiving several of the various notices for termination of the lease, defendant and his associates had a change of mind and decided to accept Roti's proposal. The suggestion appears to us as the probable explanation of the entire transaction. Upon

the record presented we would not be justified in disturbing the court's finding that no month-to-month tenancy existed.

The other major contention is that, Roti having served demand for possession on July 1, 1943, it became necessary that he and not Holtzman should bring the action in forcible detainer. As between the landlord, Roti, and the lessee, Holtzman, the latter was entitled to possession under the lease on July 1, 1943. By entering into the lease with Holtzman, Roti relinquished any right he might have had to possession of the premises, and transferred to Holtzman the absolute right to possession on and after July 1. Holtzman was therefore the proper and only party entitled to institute the forcible detainer proceeding. Ch. 57, sec. 2, Ill. Rev. Stat. 1943, and ch. 80, sec. 14 of the same statutes; George J. Cooke Co. v. Kaiser, 163 Ill. App. 210; First National Bank of Chicago v. Bohnhorst, 305 Ill. App. 251; Grand Union Tea Co. v. Hanna, 164 Ill. App. 570. Roti would not have been the proper party plaintiff. Allen v. Webster, 56 Ill. 393.

It is urged that Roti elected on July 1, 1943 to serve notice on Goodman for the purpose of terminating his tenancy. Along with that contention it is argued and apparently conceded that "Defendant's lease had a definite time of expiration and at the end of the term the landlord, or some one claiming under him, could sue to recover possession without notice or demand." We agree entirely with the quoted portion of defendant's argument. It finds support in secs. 12 and 14, ch. 80, Ill. Rev. Stat. 1943, and sec. 2 of ch. 57 of the same statutes; Webb v. Heyman, 40 Ill. App. 335; First National Bank of Chicago v. Bohnhorst and George J. Cooke Co. v. Kaiser, supra. In the latter case the court dismissed the contention that the service of demand for immediate possession was defective by stating that no notice to quit or demand was necessary, and judgment for possession was entered in favor of the second lessee and

[illegible]

against a prior lessee holding over beyond the term. There is also the circumstance that Holtzman had nothing whatever to do with the preparation of the notice which Roti served upon Goodman, and we would certainly not be warranted in holding that a notice, prepared and served by a person not entitled to possession, which stated that a tenancy would terminate on the date of its automatic termination under the express provisions of the lease, should be held to extend the term beyond the time stated in the notice and specified in the lease.

Since we hold that no month-to-month tenancy was ever created or existed between the landlord and Goodman, that the latter's right to possession terminated June 30, 1943, that plaintiff's right to possession began July 1, 1943, and that Holtzman and not Roti was the proper party to bring the forcible detainer proceeding, the judgment in favor of Holtzman for possession of the premises should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42344

FRANKENSTEIN & COMPANY, a
corporation, etc., et al.,
Plaintiffs,

v.

RICHARD L. WILLIAMS, JR.,
et al., (Defendants)
Appellees.

JAMES NICHOLS and ANDREW G.
HALAS, doing business under
the name and style of
Anderson-Halas & Associates,
(Plaintiffs) Appellants.

463
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

3231.A. 276²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This suit was brought by two groups of real estate brokers for the recovery of commissions. The amended complaint contained two counts. The first count involved an action in equity wherein Frankenstein & Company, Harold Eschback, James Nichols, Edmund O. Bill and Joseph DeVoney, plaintiffs, sued Forman Realty Trust and the individual trustees thereof for alleged commissions but no appeal has been taken from the judgment entered as to that count. The second count involves an action at law wherein Andrew G. Halas and James Nichols, plaintiffs, sued Richard L. Williams, Jr., defendant, for brokerage commission alleged to be due Halas in connection with the sale or exchange of certain land in Indiana, and for brokerage commission alleged to be due Halas and Nichols for procuring a first mortgage loan on the Shoreline Building for defendant Williams. The case was heard by the trial court without a jury and there was a finding and judgment in favor of defendant Williams as to count two, and it is from this judgment that plaintiffs Halas and Nichols appeal.

At the time in question defendant Williams was a young man recently out of college and he was working in the office of plaintiff Halas for the purpose of learning the real estate business. It appears from the record that prior to the time of the instant transaction Halas had initiated and consummated other real estate deals

for Williams of a kind similar to the instant one.

In count two as amended, "plaintiffs, Andrew G. Halas, doing business under the name and style of Anderson-Halas & Associates, and James Nichols" allege that they are duly licensed brokers; that Halas, plaintiff, was employed by Williams to sell a certain piece of real estate known as the "Williams Farm," in Indiana; "3. That said plaintiff, Halas, contacted Frankenstein & Company, brokers for Forman Realty Trust, and as a result of their negotiations an offer for the sale of said Williams Farm at the price of \$150,000 in exchange for the Shoreline Building and \$250,000, was made by the defendant, Richard L. Williams, Jr., to the Forman Realty Trust, provided a loan of \$250,000 could be secured on said Shoreline Building in accordance with the terms of said offer, a copy of which is hereto attached, marked 'Exhibit A', and by express reference thereto made a part hereof. 4. That the defendant, Richard L. Williams, Jr., promised the plaintiffs, Halas and James Nichols, that if they secured a loan upon the aforesaid property, the Shoreline Building, in the sum of \$250,000, according to the terms of his said offer, Exhibit 'B', he would pay them one and one-half per cent commission on said \$250,000, or the sum of \$3,750; that on behalf of the defendant, Richard L. Williams, Jr., said plaintiffs, Halas and James Nichols, procured a party, the Equitable Life Assurance Society of the United States, who, on July 14th, 1938, was ready, willing and able to make said loan upon said terms, and that said Equitable Life Assurance Society of the United States undertook and agreed to make said loan upon said premises on July 14th, 1938;" that the offer of Williams was accepted by Forman Realty Trust on July 1, 1938, and that said Trust was ready, willing and able to perform all the terms and conditions of the agreement; "7. That plaintiff is informed and believes that thereafter defend-

for Williams of a kind similar to the first one.
In court two was awarded, "Williams, et al., et al.,
doing business under the name and style of Williams-
Associates, and James Nichols" and that they had duly
increased profits; that James, Williams, was employed by
Williams to sell a certain stock of real estate known as the
"Williams Trust," in Indiana; that said Williams, et al.,
connected themselves with a company, known as the "Indiana
Trust," and as a result of their negotiation in order for the
sale of said Williams Trust the price of \$1,000,000 was paid
for the Phoenix Building and \$250,000 was paid by the
Trust, which said Williams, et al., in the former said Trust,
provided a loan of \$250,000 could be secured on said Phoenix
Building in accordance with the terms of said offer, a copy of
which is hereto attached, signed "Williams, et al., by express
reference thereto made a part hereof." That the defendant,
Richard L. Williams, Jr., procured the defendant, James and
James Nichols, that if they secured a loan from the defendant
property, the Phoenix Building, in the sum of \$250,000,
according to the terms of his said offer, which he, the
defendant, would pay them on and on until payment in full on said
\$250,000, or the sum of \$1,750,000, that on behalf of the defendant,
Richard L. Williams, Jr., said defendant, James and James
Nichols, procured a party, the Phoenix Building Finance Society
of the United States, Inc., on July 14th, 1938, willing
and able to make said loan upon said terms, and that said Phoenix
Building Finance Society of the United States, Inc., took and
agreed to make said loan upon said premises on July 14th, 1938;
that the offer of Williams was accepted by Phoenix Building Trust
on July 1, 1938, and that said Trust was ready, willing and able
to perform all the terms and conditions of the agreement; "Y.
That plaintiff is informed and believes that defendant

ant, Richard L. Williams, Jr., without cause, then refused to complete the aforesaid loan from Equitable Life Assurance Society, or to perform all of the terms and conditions required of him under the aforesaid agreement, and that said defendant, Richard L. Williams, Jr., and his agents did their best to dissuade and prevent said Equitable Life Assurance Society from completing the proposed loan and to encourage said Forman Realty Trust to abandon said agreement." The count then alleges that by reason of said default of Williams, Halas, doing business under the name and style of Anderson-Halas & Associates, was entitled to a real estate commission for obtaining a purchaser for the Williams Farm; and that Halas and Nichols, plaintiffs, have been damaged in the sum of \$3,750. Attached to the complaint as Exhibit A is a copy of a proposal signed by Williams and addressed to the Forman Realty Trust. By this proposal defendant Williams agreed to buy certain real estate located at 2221-31 East 67th street, Chicago, which was known as the Shoreline Building, and to pay for the said property \$250,000 in cash, and in addition agreed to deliver as part of the purchase price a certain farm in Indiana. The proposal contains certain provisions usually contained in an instrument of the kind in question but which are not material upon this appeal. The proposal also contains the following important provisions: "It shall be understood and agreed that the conveyance of the property at 2221-31 East 67th Street shall be made to a Trust known as Shoreline Building Trust, and this Trust shall procure a First Mortgage loan on the above said property, for the amount of \$250,000, to be signed by the Trustee of said Trust, as a Trustee, and not individually, at 5 per cent interest per year, and 5 per cent payments per year, interest and prepayments payable quarterly, the entire loan payable in 10 years. The commission for procuring this loan shall not exceed 1-1/2 per cent. It is also understood and agreed that if the above mentioned loan can not be procured on terms as above

and, Richard L. Williams, Jr., Attorney at Law, New York City, to
complete the above-mentioned plan and to execute all of the documents necessary
of his under the above-mentioned plan, and to execute all of the documents
Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
discharge and release and to execute all of the documents necessary to
complete the above-mentioned plan and to execute all of the documents
trust to be given with reference to the above-mentioned plan and to execute all of the documents
by reason of said trust of Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
under the name and style of Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
entitled to a full and complete discharge and release and to execute all of the documents
for the above-mentioned plan; and that Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
have been done in the act of 1917, and to execute all of the documents
as a trust is a copy of a proposed plan of Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
addressed to the above-mentioned plan. By this proposed plan
Williams agreed to pay certain trust to be given to Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
out of the trust, which was given to the above-mentioned plan
Williams, and to pay for the same certain trust to be given to Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
in addition agreed to be given to Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
certain trust to be given to Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
entirely contained in an instrument of the date of 1917, and to execute all of the documents
which are not material upon this trust. The proposed plan also con-
tains the following important provisions: It shall be understood
and agreed that the conveyance of the property to Richard L. Williams, Jr., and his agents and assigns, and to execute all of the documents
out of the trust shall be made to a trust which is a corporation organized
under the laws of the State of New York, and this trust shall provide a first mortgage loan on the
above-mentioned property, for the amount of \$100,000, to be repaid by
the trustee of said trust, as a trustee, and not individually,
at 5 per cent interest per year, and 5 per cent payments per year,
interest and principal payable quarterly, the said loan pay-
able in 10 years. The corporation for the purpose of this loan shall
not receive any other funds. It is also understood and agreed that
if the above-mentioned loan can not be procured on terms as above

specified, this proposal shall become null and void." Also attached to the complaint as an exhibit was Forman's acceptance of the proposal.

The following are the material parts of the answer filed by Williams: Defendant denies that plaintiffs Halas and Nichols "procured a party, The Equitable Life Assurance Society of the United States, who on July 14, 1938, were ready, willing and able to make said loan upon said terms and denies that said The Equitable Life Assurance Society of the United States undertook and agreed to make said loan upon said premises on July 14, 1938, or on any other date, in accordance with the terms of plaintiff's Exhibit A. This defendant states that neither The Equitable Life Assurance Society of United States, nor any other person, firm or corporation, undertook and agreed to make said loan upon said premises on July 14, 1938 or at any other time." The answer further denies that defendant at any time refused to complete the loan from the Equitable Life Assurance Society of the United States "and that he did not at any time refuse to perform all or any of the terms and conditions required of him under the aforesaid agreement, but on the contrary states that he was at all times ready, willing and able to perform the terms and conditions, on his part required to be performed, in accordance with the terms and conditions of plaintiff's Exhibit A, and this defendant denies that he or his agents, or either of them, did any act whatsoever to dissuade and prevent said The Equitable Life Assurance Society of the United States from completing the proposed loan or to encourage said Foreman Realty Trust to abandon said agreement."

Plaintiff Halas concedes that his right to a commission in connection with the Indiana Farm was conditioned upon the ability of defendant Williams to obtain the loan of \$250,000, but he contends that the brokers produced a lender ready, willing and able to make the \$250,000 loan to Williams and that therefore he,

specified, this proposal shall become null and void. Also attached to the complaint as an exhibit was Foreman's acceptance of the proposal.

The following were the material facts of the matter filed by Williams: Defendant denies that Plaintiff's wife and children "procured a party, the United Life Insurance Society, of the United States, who on July 14, 1933, were ready, willing and able to make said loan upon said terms and conditions that with the Plaintiff Life Insurance Society of the United States and Foreman and agreed to make said loan upon said terms and conditions on July 14, 1933, or on any other date, in accordance with the terms of Plaintiff's Exhibit A. This defendant states that in the Plaintiff's Life Insurance Society of United States, nor any other person, firm or corporation, understood or agreed to make said loan upon said premises on July 14, 1933 or at any other time." The defendant further denies that defendant or any of his agents or employees the loan from the Plaintiff Life Insurance Society of the United States "and that he did not at any time intend to perform all or any of the terms and conditions required of him under the aforesaid agreement, but on the contrary states that in accordance with the terms and conditions of Plaintiff's Exhibit A, and this defendant denies that he or his agents, or either of them, did any act whatsoever to dissuade and prevent said Plaintiff Life Insurance Society of the United States from completing the proposed loan or to encourage said Foreman to enter into to abandon said agreement."

Plaintiff also concedes that his right to a commission in connection with the said loan was conditioned upon the ability of defendant Williams to obtain the loan of \$250,000, but he contends that the brokers procured a lender ready, willing and able to make the \$250,000 loan to Williams and that therefore he,

Halas, was "entitled to his commission" for the sale of the Indiana Farm. The theory of plaintiffs Halas and Nichols is that when they "found for their principal (the defendant Williams) a party (Equitable Life Assurance Society) who was ready, willing and able to make a \$250,000 loan upon the terms specified by their principal, they had done all that was required of them and are entitled to their commissions." Plaintiffs state in their brief that the Equitable Life Assurance Society was ready, willing and able to make the loan upon the terms specified in the contract, and they further state that defendant Williams "either did not wish to complete the transaction, because of change of mind, chicanery, inaction, or tacit agreement between the purchaser and lender not to sell the property or borrow the money." This theory accords with the allegations of the amended complaint "that the said plaintiffs, Halas and James Nichols, procured a party, the Equitable Life Assurance Society of the United States, who, on July 14th, 1938, was ready, willing and able to make said loan upon said terms," and that defendant, "without cause, then refused to complete the aforesaid loan," and "his agents did their best to dissuade and prevent the Equitable Life Assurance Society from completing the proposed loan," and it was necessary for plaintiffs, in order to recover, to prove these material and essential allegations in the complaint. Defendant Williams strenuously contends that the proposal made by him was void by its terms, in the absence of a loan having been procured, and that, aside from the proposal, the evidence shows clearly that "the very nature of the deal, of this whole transaction, was that \$250,000 cash was needed to pay over to The Forman Realty Trust as the cash portion of the purchase price. The purpose for which it was needed and required was known to all parties involved and most certainly by the plaintiff, Halas, who originated, conceived and engineered the entire details of the deal from its inception," and that before Halas or anyone else would be entitled to a commission it was

... was "entitled to the commission" for the sale of the
Indiana land. The theory of the plaintiff is that the
plaintiff (the defendant) (the defendant) (the defendant)
and some to make a loan upon the terms specified by their
principal, they had done all that was required of them and are
entitled to their commission. "The plaintiff states in its brief
that the defendant life insurance society was ready, willing and
able to make the loan upon the terms specified in the contract,
and they further state that the defendant life insurance society did not
wish to complete the transaction, because of change of mind,
chicanery, invention, or tacit agreement between the plaintiff
and loan to sell the property of the plaintiff to the plaintiff. The
theory is that the allegations of the plaintiff are inconsistent with
the said plaintiff, and the said plaintiff, plaintiff, plaintiff,
the defendant life insurance society of the defendant (the plaintiff),
on July 14th, 1905, was ready, willing and able to make said loan
upon said terms, and that the plaintiff, "without cause, then refused
to complete the transaction, and the plaintiff did their best
to dissolve and prevent the defendant life insurance society from
completing the proposed loan," and it was necessary for plaintiff
to, in order to recover, to prove these material and essential
allegations in the complaint. Defendant's motion is strenuously
contended that the proposed loan by its very nature, in
the absence of a loan having been proposed, and that, aside from
the proposal, the evidence shows clearly that the very nature of
the deal, of this whole transaction, was that \$250,000 cash was
needed to pay over to the plaintiff, that as the cash position
of the plaintiff, the purpose for which it was needed and
required was known to all parties involved and most certainly by
the plaintiff, and, and originated, conceived and anticipated
the entire details of the deal from its inception, and that before
sale or anyone else would be entitled to a commission it was

necessary that defendant obtain the loan. As we view this appeal, it is not necessary for us to decide this contention of defendant. Defendant further contends that plaintiffs did not obtain a lender who was ready and willing to lend the \$250,000 upon the terms set forth in his proposal to the Forman Realty Trust and that he was ready and willing at all times to consummate the loan in accordance with the terms of his proposal.

Before the Forman Realty Trust had accepted Williams' proposal plaintiff Halas prepared an application to The Equitable Life Assurance Society of the United States (hereinafter also called the Equitable) for a mortgage loan of \$250,000. This application was signed by Herbert C. Anderson, Trustee, without personal liability. Anderson was an employee of plaintiff Halas and the latter caused Anderson, as Trustee, to also sign, in connection with the application for the loan, an "Owner's Credit Information (Confidential)" to the Equitable. Under date of July 14, 1938, the Equitable addressed to defendant Williams the following letter:

"We are advised by the Home Office that the Finance Committee has passed on your application for a first mortgage covering the above property.

"They also advise that instructions are being forwarded as to the preparation of mortgage papers.

"Yours very truly,

"S. G. Eaton, Loan Supervisor

"By: A. Kean"

On September 2, 1938, Murphy, Lilliander and Gemmill, attorneys for defendant Williams, wrote the following letter to the attorneys of the Equitable:

"Mayer, Meyer, Austrian & Platt,
"Attorneys-at-Law,
"231 South LaSalle Street,
"Chicago, Illinois

"Attention: Mr. Sherwood K. Platt
"Re: Shoreline Apartments, 2221-31 E. 67th Street

necessarily first defendant obtain the loan, in view of the fact that it is not necessary for us to make this declaration of defendant. Defendant further contends that Plaintiff did not obtain a loan who was ready and willing to lend the money and that he was forth in his refusal to the loan. Plaintiff did not obtain a loan ready and willing at all times to contribute the loan in accordance with the terms of the proposal.

Before the former party could have accepted Plaintiff's proposal Plaintiff also proposed an application to the Plaintiff's life insurance policy of the United States (hereinafter also called the "policy") for a mortgage loan of \$20,000. This application was signed by Plaintiff, Defendant, Plaintiff's personal liability, Defendant and an employee of Plaintiff and the latter caused Plaintiff, as trustee, to also sign, in connection with the application for the loan, an "Affidavit of Information" (hereinafter to the "Affidavit") in the form of the 14, 1933, the Affidavit attached to Plaintiff's letter the following letter:

"We are advised by the bank which that the mortgage loan was passed on your application for a first mortgage covering the above property.

"They also advise that instructions are being forwarded as to the preparation of mortgage papers.

Yours very truly,

W. C. Eaton, Loan Supervisor

W. C. Eaton

On September 2, 1933, Murphy, Plaintiff and Gerald, attorneys for defendant Williams, wrote the following letter to the attorneys of the Plaintiff:

"Mayer, Meyer, Nathan & Platt,
Attorneys-at-Law,
231 South LaSalle Street,
Chicago, Illinois

Attention: Mr. Sherwood E. Platt
Chicago Apartment, 2221-21 E. 57th Street

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"Dear Mr. Platt:

"In accordance with our telephone conversation this morning, we are herewith enclosing Chicago Title and Trust Company letter of opinion #2318008 dated August 29, 1938 with reference to the Shoreline Apartments, legally described as follows: [Here follows legal description of property.]

"This is the property upon which the Equitable Life Assurance Society is to make a loan of \$250,000, payable in 15 years, with 5% pre-payments payable quarterly, and with interest at the rate of 5% per annum.

"They have also agreed that this mortgage or trust deed and notes are to be executed by a Trustee, with no personal liability on the part of the Trustee, or any person interested beneficially, or otherwise, in said premises. We have selected the Chicago Title and Trust Company as the Trustee to hold this title for our clients under their usual form of Land Trust, provided that they will as such Trustee be willing to sign the form on the mortgage or trust deed and notes which you are to prepare.

"We have this day ordered a survey as requested by you which we are informed will be ready for delivery to you about the middle of next week.

"Thanking you for your courtesy and co-operation in this matter, we remain

"Yours very truly,

"Murphy, Lilliander and Gemmill

"By: E. E. Lilliander

"EEL:SD

"enc.

"P. S. Kindly return the letter of opinion when it has served your purpose."

On September 7, 1938, the following letter was sent to defendant Williams' attorneys:

June 12, 1938

"In accordance with our telephone conversation this morning, we are hereby enclosing Chicago title and trust company letter of opinion dated June 12, 1938, with reference to the above line properties, heretofore described as follows: (See followings description of property.)

"This is the property upon which the Chicago title insurance policy is to issue a loan of \$20,000, payable in 15 years, with 2% pre-payment penalty quarterly, and with interest at the rate of 2% per annum.

"They have also agreed that this mortgage is to be executed by a Trustee, who is to execute the same on the part of the Trustee, or any person interested therein, or otherwise, in said premises. We have advised the Chicago title and trust company as the Trustee to hold this title for our clients under their usual form of land trust, providing that they will as such Trustee be willing to sign the loan on the mortgage or trust deed and notes which you are to prepare.

"We have this day ordered a survey as requested by you when we are informed will be ready for delivery to you about the middle of next week.

"Thanking you for your courtesy and co-operation in this

matter, we remain

Very truly yours,
J. E. Williams, Attorney
Chicago, Illinois

"Enc.
"

"I will finally return the letter of opinion when it has served your purpose."

"On September 7, 1938, the following letter was sent to defendant Williams, attorneys:

"Re: Shoreline Apartments
2221-31 East 67th Street

"Messrs. Murphy Lilliander & Gemmill
"11 South LaSalle Street
"Chicago, Illinois

"(Mr. Lilliander)

"Dear Sirs:

"We have prepared and enclose herewith two copies of proposed form of mortgage and principal note for use in connection with the above loan. These forms are identical, except as to figures and payment dates, with forms executed by Chicago Title and Trust Company under its Title Holding Trust No. 31992. Please advise us if these forms are satisfactory, as it is necessary for us to submit the same to the Home Office of the Society for its approval prior to the recording thereof.

"We return herewith Chicago Title and Trust Company Opinion of Title No. 2318008, which seems to be in satisfactory condition with the exception of the tax status. We assume that the tax objections will be taken care of by a guaranty security deposit or tax injunction proceeding satisfactory to the Title Company.

"We call your attention to the fact that our instructions from the Society require us to look to the borrowers for our fees, and we shall be glad to discuss the same with you at any time. Please also secure and deliver to us a copy of the trust under which the Title Company holds title as the Home Office requires a copy thereof for its files.

"Very truly yours,

"Mayer Meyer Austrian & Platt

"By:

"SKP/lcb
"Enclosures"

On December 27, 1938, Equitable wrote the following letter to Herbert C. Anderson:

"Re: Loan Application - Shoreline Apartments
2221-31 E. 67th Street
Chicago, Illinois

Enclosed for Mr. [Name] is a copy of the [Document] [Date]

Very truly yours,
[Signature]
[Name]
[Address]
[City, State]

Dear Sir:

We have received and reviewed the report of [Name] dated [Date] and find it to be in accordance with the above facts. The report is correct in all particulars and we are satisfied with the results of the investigation. We have no objection to the report being used for the purpose for which it was prepared. We are, however, unable to advise as to the exact date of the report, as it is necessary for us to submit the same to the Board of Directors for their approval prior to the meeting of the Board.

The report herewith Chicago Title and Trust Company, which seems to be in accordance with the facts of the case. The report is correct in all particulars and we are satisfied with the results of the investigation. We have no objection to the report being used for the purpose for which it was prepared. We are, however, unable to advise as to the exact date of the report, as it is necessary for us to submit the same to the Board of Directors for their approval prior to the meeting of the Board.

We call your attention to the fact that the report is correct in all particulars and we are satisfied with the results of the investigation. We have no objection to the report being used for the purpose for which it was prepared. We are, however, unable to advise as to the exact date of the report, as it is necessary for us to submit the same to the Board of Directors for their approval prior to the meeting of the Board.

Very truly yours,
[Signature]
[Name]
[Address]
[City, State]

Very truly yours,
[Signature]
[Name]
[Address]
[City, State]

On December 27, 1934, [Name] wrote the following letter to Herbert C. Anderson:

Re: Loan Application - [Name] Apartments
[Address]
[City, State]

"Dear Mr. Anderson:

"Under date of July 25, 1938, the Society sent instructions to local counsel for the closing of the loan on the above property, for which you made application June 20th. However, you will recall that they wished to have Mr. Williams sign the papers which he was unwilling to do. I have made every effort to work out a compromise arrangement which would be satisfactory to the Society and to the borrower but apparently without success.

"The Society's approval in this case has already been outstanding longer than we usually permit without some assurance that the loan can and will be closed, and the matter can not be held open any longer. Therefore, please be advised that our commitment is definitely withdrawn. If Mr. Williams should later decide to go ahead with the purchase of this property and would be willing to agree to any of the several arrangements which I suggested, we shall be pleased to reconsider the loan, but it would be necessary in that case to submit a new application to our Finance Committee.

"Very truly yours,

"S G E

"S. G. Eaton,

"Loan Supervisor

"SGE:HC

"CC: Murphy, Lilliander & Gimmell
J. F. Nichols
Forman Realty Trust Co."

Plaintiffs rest their case upon the foregoing instruments and letters.

Clifford C. Wood, called by defendant Williams, testified that he was a regional loan supervisor for the Equitable; that his jurisdiction extended over ten states; that neither Mr. Barrons nor Mr. Eaton had authority to make loans for the Equitable; that in connection with an application for a loan there is a credit statement from the applicant; that he looked at the property, the Shoreline Apartments, and reviewed the appraisal report after he

"Dear Mr. Watson:

Under date of July 25, 1935, the Society sent instructions to local counsel for the closing of the loan on the above property, for which you had application June 20th. However, you will recall that they wished to have Mr. Williams sign the report which he was unwilling to do. I have made every effort to get him to sign the endorsement which would be satisfactory to the local bank and to the borrower but apparently without success.

"The Society's approval in this case has already been outstanding longer than we usually wait without some assurance that the loan can and will be closed, and the matter cannot be held open any longer. Therefore, please be advised that our commitment is definitely withdrawn. Mr. Williams should have decided to go ahead with the purchase of this property and would be willing to agree to any of the several instruments which I suggested, we shall be pleased to reconsider the loan, but it would be necessary in that case to submit a new application to our Finance Committee.

Very truly yours,

W. B. Watson,
Loan Supervisor

"CC: Mr.

"CC: Murphy, William T. & Willard
J. F. Nichols
Farmers Realty Trust Co."

Plaintiffs rest their case upon the foregoing instruments

and letters.

Alfred C. Wood, called by defendant Williams, testified that he was a regional loan supervisor for the Equitable; that his jurisdiction extended over ten states; that neither Mr. Watson nor Mr. Eaton had authority to make loans for the Equitable; that in connection with an application for a loan there is a credit statement from the applicant; that he looked at the property, the shoreline, partitions, and reviewed the appraisal report after he

had returned from Minneapolis; that he reviewed the credit statement that was a part of the application; that a commitment by the Equitable must be signed by an executive officer of the Society; that he dictated a letter withdrawing the approval of the \$250,000 loan; that there was "a very definite misunderstanding in connection with the credit report which was filed;" that "the objection was that I personally had agreed to recommend the loan, recognizing it was an excessively full loan, only because of the exceptional credit as revealed by the credit report. And when I found that the credit, or the additional collateral security was not there, I ordered a reduction in the amount of the loan, or some other conditions which would offset the loss of the additional collateral. * * * Q. Well, as far as you are concerned, did you have any instructions before you made that loan, that you should demand the signature of Mr. Williams, Senior, and Mr. Williams, Junior, on the mortgage papers, or the notes? A. Yes. I gave those instructions after I found that the credit report was not what I had supposed it to be. * * * Q. Now, Mr. Wood, did the Equitable Life Assurance Society at any time ever loan to Richard L. Williams, Junior, \$250,000 on the Shoreline Building, pursuant to the application that you have testified to? A. No. * * * Q. Well, did you ever produce \$250,000.00 for the use and benefit of Mr. Richard L. Williams, pursuant to the application which you have testified about here? * * * The Witness: A. No. We did not."

William B. Gemmill, one of the attorneys for defendant Williams, testified that in the early part of October or the very last part of September [1938] Mr. Lilliander and he went over to see Mr. Eaton at the latter's office and that they there saw him, Barrons and Wood; that "Mr. Eaton said that under the circumstances, and because of the misunderstanding, this loan would not be made unless Mr. Williams, Jr. and Mr. Williams, Sr. would personally sign the paper and -- unless Mr. Williams, Jr. would sign

had returned from Birmingham; that in reviewing the credit statement that was a part of the application; that a statement by the Trustable must be signed by an executive officer of the Society; that he checked a letter with the approval of the \$250,000 loan; that there was a very definite understanding in connection with the credit report which was filed; that the objection was that I personally had agreed to recommend the loan, recognizing it was an excessively high loan, only because of the exceptional credit as given by the credit report. And when I found that the credit, or the additional collateral security was not there, I ordered a retention in the amount of the loan, or some other condition which would offset the loss of the additional collateral. Well, as far as you are concerned, the you have any instructions before you made that loan, that you should demand the signature of Mr. Williams, Senior, and Mr. Williams, Junior, on the mortgage papers, or the notes, I have those instructions after I found that the credit report was not what I had supposed it to be. Well, Mr. Williams, and the Trustable Life Assurance Society at any time ever loan to Richard L. Williams, Junior, \$250,000 on the mortgage business, pursuant to the application that you have testified to, I, Mr. Williams, did you ever produce \$250,000 for the use and benefit of Mr. Richard L. Williams, pursuant to the application which you have testified about many times in the past? I did not.

William D. Gemmill, one of the attorneys for defendants Williams, testified that in the early part of October or the very last part of September [1935] Mr. Williams and he went over to see Mr. Eaton at the latter's office and that they there saw Mr. Barrons and Wood; that Mr. Eaton was then under the circumstances, and because of the misunderstanding, this loan could not be made unless Mr. Williams, Jr. and Mr. Williams, Sr. would personally sign the paper and -- unless Mr. Williams, Jr. would sign

the paper and Mr. Williams, Sr. would sign the guarantee. Mr. Lilliander and I said that that was not possible. That was not the original agreement, and that they would not sign. We would advise them not to sign any such guarantees. Mr. Eaton then said, 'There is apt to be some hard feelings here and I am anxious to work out some compromise if it is possible. We will give a loan of two hundred ten thousand dollars without having these men guarantee the paper.' And Mr. Lilliander and I said no, that was not satisfactory. We were ready to take the original loan on the original contract, but not that. Mr. Eaton again said that Forman Realty Trust was anxious to sell the property and anxious to help the deal out, and they were willing to suggest some kind of compromise, such as perhaps they would take a second mortgage of twenty-five thousand, and it would not take very much extra cash for Williams, if they would do that. Mr. Lilliander pointed out that Forman Realty Trust was going to go out of existence in 1943, and the second mortgage would have to have some very substantial prepayments before then, and that was too much of a departure from the original deal, that we were still ready for that but no other."

The testimony of Ernest E. Lilliander, one of the attorneys for defendant Williams, substantiates that of Attorney Gemmill as to the conversation that occurred in the office of Mr. Eaton. This witness further testified that after the Equitable refused to make the loan he "wrote letters to Quinlan and Tyson, requesting that they consider an application for a loan in accordance with the terms of the contract that Mr. Williams had signed, and I sent a similar letter to Great Lakes Mortgage Corporation and also Paul A. Weil & Company and I subsequently received their answers stating they were not interested in making a loan of two hundred and fifty thousand dollars on this building." Defendant Williams testified that he was always ready and willing to go

through with the matter of the loan in accordance with the agreement signed by him. Neither Halas nor Nichols testified in the case, and there is considerable force in the argument of defendant Williams that if the loan could have been obtained from the Equitable, in accordance with the terms of his proposal, and he had prevented the consummation of the loan, they would have testified.

The evidence conclusively shows that the Equitable was not ready and willing to make the loan of \$250,000 upon the terms stated in defendant's proposal to Forman Realty Trust, and further shows that defendant was always willing to have the loan consummated upon said terms. It is clear therefore that plaintiffs' case as alleged in the complaint was not sustained by the proof. As a dernier ressort, plaintiffs, in their reply brief, seek to sustain their right to recover commission upon a new theory: They concede that defendant could not, by suit, compel the Equitable to make the loan, but, they contend, that Williams, in an apt suit, could recover damages from the Equitable for its refusal to make the loan "in accordance with its agreement so to do," and, therefore, they are entitled to commissions. It is difficult to believe that this contention is seriously made. No such claim is set up in the complaint, but, even if it were set up, plaintiffs do not, and in our judgment cannot, cite any case that would support this new position, which amounts to this: Plaintiffs brought about a situation that furnished defendant - not with an opportunity to compel the Equitable to make the loan - but with an opportunity to sue it for damages for not making the loan, and that plaintiffs were thereby entitled to commission from defendant under the proposal made by the latter to the Forman Realty Trust. Moreover, we are of the opinion that the evidence would not justify a finding that a valid and binding acceptance of the application for the loan

known with the action of the loan in connection with the
statement signed by him. William Williams was a partner
in the case, and there is considerable doubt in the statement
of defendant Williams that the loan could have been obtained
from the plaintiff, in connection with the terms of this pro-
posal, and he has presented the consideration of the loan, they
would have testified.

The evidence conclusively shows that the plaintiff was
not ready and willing to make the loan of \$100,000. When the
terms stated in defendant's proposal to borrow \$100,000, 1900,
and further shows that defendant was not willing to have
the loan guaranteed upon said terms. It is clear therefore
that plaintiff's case as alleged in the complaint, was not sus-
tained by the facts. As a general principle, plaintiff, in their
reply brief, seek to establish their right to recover damages
upon a new theory: They contend that defendant would not pay,
and, except the plaintiff to make the loan, and, they contend,
that plaintiff, in the same suit, would recover damages from the
plaintiff for its refusal to make the loan. The court has with-
drawn its opinion as to the plaintiff's right to recover damages
to the plaintiff, and the plaintiff, they are entitled to
consideration. It is difficult to believe that this consideration
is seriously made. No such claim is made in the complaint,
but, even, if it were set up, plaintiff is not, and in our opin-
ion cannot, state any case that would support such a position,
which amounts to this: Plaintiff demands that the plaintiff
furnished defendant - not with an opportunity to make the
loan - but with an opportunity to make it
for damages for not making the loan, and that plaintiff was
thereby entitled to consideration from defendant under the proposal
made by the latter to the former to pay \$100,000, however, as to
of the opinion that the plaintiff would not actually sustain the
a valid and binding acceptance of the application for the loan.

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was made by the Equitable. (See Snow v. Schulman, 352 Ill. 63, 71, 73.)

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

as made by the public. (See also v. 2, p. 111.)

63, 71, 73)

The judgment of the District Court of Cook County should

be affirmed as stated.

THE COURT AFFIRMS.

Friend, P. J., and Oliver, J., concur.

42383

ANNA KUSAK,
(Plaintiff) Appellee,

v.

FRANK KARNIK et al.,
(Defendants) Appellees.

HART E. BAKER,
(Petitioner) Appellant.

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APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

3231.A. 277'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Hart E. Baker appeals from an order entered denying the prayer of his petition that he be allowed attorney's fees under the Attorney's Lien Act. The petition was filed in the main proceeding, a creditor's bill, brought by Anna Kusak, plaintiff, against Frank Karnik et al.

The creditor's bill was filed by Baker as attorney for Anna Kusak and it was based upon an uncollected judgment for \$1,000 that had been entered in the Circuit court of Cook county in 1933 or 1934, in favor of Anna Kusak and against defendant Frank Karnik. That Baker rendered legal services in connection with the creditor's bill clearly appears from the record. The verified petition filed by Baker, on May 18, 1942, sets forth, inter alia, that about April 19, 1937, he was retained by plaintiff to represent her in her claim against the defendants arising out of said judgment and that he prepared and filed the creditor's bill. The petition recites the services he rendered in connection with the proceedings. It alleges that about November 22, 1940, another attorney was permitted by the court to enter his appearance as additional counsel for plaintiff, but that petitioner continued to act as counsel for plaintiff and attended at the taking of the depositions of two of the defendants about March 7, 1941, and that through the joint efforts of petitioner and the additional counsel defendants made an offer of settlement in the sum of \$750 in cash, which offer had been accepted by plaintiff. The

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The petition was filed in the District Court of the United States for the District of Columbia, and the petition was granted. The petition was filed in the District Court of the United States for the District of Columbia, and the petition was granted.

The petition was filed in the District Court of the United States for the District of Columbia, and the petition was granted. The petition was filed in the District Court of the United States for the District of Columbia, and the petition was granted. The petition was filed in the District Court of the United States for the District of Columbia, and the petition was granted.

petition further alleges that petitioner had no definite agreement with plaintiff as to the amount of his fee and that he claims a lien for a reasonable fee for his services rendered in the proceeding. Defendants made no answer to the petition, but Anna Kusak, by leave of court, filed the following "Second Amended Answer" to the petition:

"The plaintiff Anna Kusak states that the petitioner, Hart E. Baker, is not a duly licensed attorney at law in the State of Illinois, and has not been practicing in Chicago for upwards of 20 years last past.

"That she did not on or about April 19, 1937, retain said petitioner to represent her in the matter of her claim against the defendants arising out of a judgment in her favor in the Circuit Court of Cook County, entered on or about May 5, 1933, against the defendant, Frank Karnik, but states that she retained him as her said attorney in November, 1934.

"That said petitioner did not prepare and file in the above entitled cause a complaint in chancery on May 1, 1937, in the nature of a creditor's bill; that he did not cause summons to be issued and served upon the defendants; that he did not examine the tract indexes in the office of the recorder of deeds of Cook County and other sources of information relative to the record title to the real estate mentioned in said complaint; that he did not examine the files in the Circuit Court in said suit of Anna Kusak vs. Frank Karnik, including the files in a garnishment suit instituted upon said judgment; that he did not personally visit the several pieces of real estate mentioned in said complaint; that he did not interview the tenants occupying said premises; that he did not interview the defendants, Frank Karnik, Bohuslav Vratislavski and Frank J. Pavek, and did not make diligent efforts to ascertain the whereabouts of the defendant, Fred Redl; that he did not examine the

petition further alleged that petitioner had on October 2, 1937, went with plaintiff as to the amount of his fee and that he claimed a lien for a reasonable fee for his services rendered in the proceeding. Petitioner was to answer to the petition, but Anna Baker, by leave of court, filed the following "second amended answer" to the petition:

"The plaintiff Anna Baker is the petitioner, and Anna Baker, is not a duly licensed attorney at law in the State of Illinois, and has not been practicing in Chicago for upwards of 25 years last past.

"That she was not on or about April 19, 1937, when said petitioner to represent her in the matter of her claim against the defendants existing out of a judgment in her favor in the Circuit Court of Cook County, entered on or about May 2, 1935, against the defendants, Frank E. Smith, and Frank J. Smith, and that she retained him as her attorney in November, 1934.

"That said petitioner did not receive said fee in the above entitled cause a complaint in the year on May 1, 1937, in the nature of a creditor's bill; that he did not cause summons to be issued and served upon the defendants; that he did not examine the best indices in the office of the Recorder of Deeds of Cook County and other sources of information relative to this record title to the real estate mentioned in said complaint; that he did not examine the files in the Circuit Court in said suit of Anna Baker vs. Frank E. Smith, including the files in a garnishment suit instituted upon said judgment; that he did not personally visit the several places of record estate mentioned in said complaint; that he did not interview the tenants occupying said premises; that he did not interview the defendants, Frank E. Smith, Douglas V. Smith and Frank J. Smith, and did not make diligent efforts to assist in the whereabouts of the defendant, Frank E. Smith; that he did not examine the

answers filed by the several defendants; that he did not interview the plaintiff, and did not obtain statements from her and her witnesses; that he did not have several conferences with the attorneys for the defendants; that he did not spend 10 hours in the law library studying the questions of law involved in said creditor's bill, and in particular that he did not examine Glenn on Fraudulent Conveyances, Hanna on Creditor's Rights and Bigelow on Fraudulent Conveyances, and did not examine the articles on Fraudulent Conveyances and creditor's rights in Corpus Juris and the Illinois Digest, and that he did not read and brief 10 Illinois Decisions; that he did not make numerous appearances in court; that he did not write six letters to the plaintiff, relative to the subject matter of the litigation, and did not obtain from the defendants on November 7, 1940, a bona fide offer of settlement in the sum of \$500.00 in cash, which he submitted to the plaintiff for acceptance or rejection.

"The plaintiff admits that on or about November 22, 1940, another attorney was permitted by the court to enter his appearance as additional counsel for the plaintiff, and admits that the petitioner attended at the taking of a deposition from the defendants on or about March 7, 1941, but states that said petitioner took no active part therein; and plaintiff states that after November 22, 1940, said petitioner took no active part in said case and did not cooperate with said additional counsel; and the plaintiff states that after November 22, 1940, said additional counsel conducted said litigation alone; and states that said petitioner did not cooperate in obtaining a bona fide offer of \$750.00 from the defendants; and states that said offer of \$750.00 in settlement has been accepted by her; that the petitioner has received from the plaintiff the sum of \$50.00 out of which said petitioner has expended the sum of

answers filed by the several defendants; that he did not know
view the plaintiff, and did not see the plaintiff from 1935 to
last witness; that he did not have personal contact with
the attorney for the defendant; that he did not spend 10
hours in the law library; the testimony of the several
in said creditor's bill, and he testified that he did not
receive from the defendant any money, and that the plaintiff's
rights and title in the defendant's property, and did not
exercise the rights in the defendant's property and creditor's
rights in the defendant's property, and that he
did not know and did not see the plaintiff; that he did not
have personal contact with the plaintiff; that he did not see the
plaintiff to the plaintiff, and that he did not see the plaintiff
in person, and did not see the plaintiff in person; that he did not
see the plaintiff in person, and did not see the plaintiff in person;
in fact, which is admitted to the plaintiff for knowledge
or rejection.

"The plaintiff admits that on or about November 22, 1935,
another attorney was retained by the plaintiff to enter his appearance
once as additional counsel for the plaintiff, and admits that
the plaintiff attended at the trial of a case on or about March 7, 1941,
defendants on or about March 7, 1941, but admits that said
petitioner took no active part therein; and admits that
that after November 22, 1935, said petitioner took no active
part in said case and did not cooperate with said additional
counsel; and the plaintiff admits that after November 22, 1935,
said additional counsel conducted said litigation alone; and
states that said petitioner did not cooperate in conducting
said litigation on or about March 7, 1941, and states that
said offer of \$750.00 in settlement has been received by him;
that the petitioner has received from the plaintiff the sum of
\$50.00 out of which said petitioner has expended the sum of

\$25.00, leaving a balance of \$25.00 still unexpended in his hands; that she and the petitioner had a definite agreement as to his fee, and states that prior to first consulting petitioner, she had been offered \$500.00 by the defendants in full settlement of her claim against them, and that she informed the petitioner in November, 1934, when she first consulted said petitioner at his office, of said offer, and that the petitioner thereupon orally agreed with her that unless he obtained for her an amount in excess of \$500.00, he would charge her no fee for his services. (Signed) Anna Kusak.

"Verification of Foregoing Answer.

"Anna Kusak being first duly sworn on oath states that she is the plaintiff in the above entitled cause; that she has had read to her and explained to her the foregoing answer by her subscribed; that she knows the contents thereof and that the facts therein contained are true. Signed and sworn to before a notary public on January 15, 1942." (Italics ours.)

An order was entered referring the petition and the answer of plaintiff to a master in chancery to take testimony and report the same together with his conclusions of law and fact.

The master found "that the petitioner first met Anna Kusak in 1934; that prior to that, the defendants had offered Anna Kusak the sum of \$500 in settlement; that the petitioner agreed to represent the respondent in the collection of her judgment, and not to charge her any fee unless he recovered more than \$500; that respondent gave petitioner \$50 to cover court costs; that petitioner expended \$24.50 for court costs; that he prepared and filed in May, 1937 a creditor's complaint; that answers were filed thereto, but that said cause was never noticed for trial; that outside of preparing and filing the complaint, the petitioner did nothing that benefited the respondent; that in November, 1940, Marcus Levy entered the case as co-counsel for the respondent, and that thereafter the petitioner did no work in the matter,

leaving a balance of \$25.00 still unpaid in his hands; that she and the petitioner had a definite agreement as to his fee, and stated that prior to that consulting fee she had been offered \$25.00 by the respondent in full settlement of her claim against him, and that she had accepted the petitioner in November, 1934, when she had been paid said fee. The petitioner at his office, or a law firm, and that the petitioner thereupon orally agreed with her that unless he obtained for her an amount in excess of \$25.00, he would return her the fee for his services. (Signed) Anna Kusk.

Verification of foregoing answer.

"Anna Kusk being first duly sworn in oath states that she is the plaintiff in the above entitled case, that she has read to her and explained to her the foregoing answer by her subscribed; that she knows the contents thereof and that the facts therein contained are true. (Signed) Anna Kusk.

An order was entered referring the petition and the answer of plaintiff to a master in equity to take testimony and report the same together with his conclusions of law and fact.

The master found that the petitioner (Anna Kusk) in 1934; that prior to that, the defendant had offered Anna Kusk the sum of \$25.00 in settlement; that the petitioner agreed to represent the respondent in the collection of her judgment, and not to charge her any fee unless he recovered more than \$25.00; that respondent gave petitioner \$25.00 to cover court costs; that petitioner expended \$24.50 for court costs; that he prepared and filed in May, 1937 a creditor's complaint; that answers were filed thereto, but that said case was never noticed for trial; that out- side of preparing and filing the complaint, the petitioner did nothing that benefited the respondent; that in November, 1940, Marcus Levy entered the case as co-counsel for the respondent, and that thereafter the petitioner did no work in the matter.

and the offer of \$750 was procured through the sole efforts of Marcus Levy; that in view of the contract between the parties, the petitioner is not entitled to any fee." The chancellor overruled petitioner's exceptions to the report of the master and entered the final order, from which petitioner has appealed.

The theory of the petitioner is that there was no express agreement between petitioner and plaintiff for any particular fee and that he rendered substantial legal services to her under an implied contract that she would pay a reasonable fee for services rendered. Plaintiff (respondent) contends that "the issue of fact was whether there was an express contract as to fees as claimed by Mrs. Kusak or an implied one for reasonable compensation as contended by Baker. * * * It is contended by the intervenor that the petitioner never perfected an attorney's lien over the claim of intervenor; that he never obtained jurisdiction over the debtor in this proceeding; that his right to a fee was contingent upon obtaining a greater sum than \$500 in settlement, which contingency never happened."

After a careful examination of the record we are satisfied that the master erred in finding "that the petitioner agreed to represent the respondent in the collection of her judgment, and not to charge her any fee unless he recovered more than \$500." Petitioner, by his testimony, made out a prima facie case entitling him to reasonable compensation for the services rendered, and as to the special defense interposed by plaintiff to petitioner's claim the burden of proving that defense was upon plaintiff. (See Kelly v. Houghton, 59 Wis. 400; Cusick v. Boyne, 82 P. 985, 986; Woodbury v. Conger, 15 N. Y. S. 926, 927; McLendon v. Chryssoverges, 120 So. 520.) Plaintiff does not question the foregoing rule of law but contends that as the master believed her testimony as to the agreement she thereby

and the offer of \$750 was presented through the sole efforts of James Levy; that in view of the contract between the parties, the petitioner is not entitled to any fee. The chancellor overruled petitioner's exceptions to the report of the master and entered the final order, from which petitioner has appealed.

The theory of the petitioner is that there was no express agreement between petitioner and respondent for any particular fee and that he rendered substantial legal services to her under an implied contract that she would pay a reasonable fee for services rendered. It is said (respondent) contends that "the issue of fact was whether there was an express contract or as to fees as claimed by Mrs. Frank or an implied one for reasonable compensation as contended by her. It is contended by the intervenor that the petitioner never perfected an attorney's lien over the claim of intervenor; that he never obtained jurisdiction over the debtor in this proceeding; that his right to a fee was contingent upon obtaining a judgment and then \$500 in settlement, which contingency never happened."

After a careful examination of the record we are satisfied that the master erred in finding "that the petitioner agreed to represent the respondent in the collection of her judgment, and not to charge her any fee unless he recovered more than \$500."

Petitioner, by his testimony, made out a prima facie case entitling him to reasonable compensation for the services rendered, and as to the special defense interposed by plaintiff to petitioner's claim the burden of proving that defense was upon plaintiff.

See Kelly v. Houghton, 29 Wis. 400; Smith v. Carey,

82 F. 255, 930; Goodwin v. Jones, 15 W. V. 246, 247;

Johnson v. Christensen, 120 So. 230. Plaintiff does not

question the foregoing rule of law but contends that as the

master believed her testimony as to the agreement she thereby

sustained the burden of proving by a preponderance of the evidence her special defense.

Petitioner and plaintiff were the sole witnesses that testified as to what occurred at the time of the agreement between the parties. Petitioner has been a practicing attorney at the Chicago bar for many years. He has acted as assistant state's attorney of Cook county and he has also represented the Chicago Legal Aid Society, and we feel impelled to state that we find nothing in the record to warrant the severe criticisms of his conduct that are made by counsel for plaintiff in her brief. It is to the credit of petitioner that he has refrained from criticizing the conduct of plaintiff's counsel in testifying for plaintiff while acting as her counsel. Petitioner testified that he was first consulted by plaintiff on April 6, 1937; that she was brought to his office by a man named Strba, who acted as interpreter (plaintiff is a Bohemian and apparently unable to carry on a conversation in English); that plaintiff, through the interpreter, told petitioner about the judgment she had obtained against Frank Karnik, and that garnishment proceedings which were instituted by her former attorney produced no results; that petitioner agreed to file a creditor's bill if plaintiff would place in his hands the sum of \$50 to cover court costs and expenses; that at no time did he have any written or verbal agreement with plaintiff as to the amount of his fee. Upon cross-examination he testified that he did not have an agreement with her to charge her nothing unless he obtained more than \$500 for her, that he did not have any understanding with her relative to his fee, and that the amount of his fee was never mentioned at any time. Plaintiff testified in the Bohemian language and her testimony was interpreted through an interpreter. Her direct evidence is short and we will give it in full: "I live at 1716 Seventeenth St., Chicago.

...the burden of proving by a preponderance of the evidence that she was not a prostitute.

...petitioner and defendant were the sole witnesses that testified as to what occurred at the time of the intercourse between the parties. Petitioner had been a prostitute at the Chicago bar for many years. She had acted as assistant state's attorney of Cook County and had also represented the Chicago Legal Aid Society, and was well known to state that she found nothing in the record to support the charge of petitioner at this contact that she made by counsel for defendant in her brief. It is to the credit of petitioner that she was not from criticizing the conduct of defendant's counsel in testifying for defendant while acting as her counsel. Petitioner testified that he was first contacted by defendant on April 1, 1935; that she was brought to his office by a man named John, who acted as interpreter (petitioner is a Bohemian and does not speak English) and a conversation in which she was unable to carry on a conversation in English; that petitioner through the interpreter, told petitioner that the defendant she had obtained against her husband, and that defendant proceedings which were instituted by her former attorney produced no results; that petitioner agreed to give a statement to him if petitioner would place in his hands the sum of \$50.00 to cover court costs and expenses; that at no time did he have any written or verbal agreement with petitioner as to the amount of his fee. Upon cross-examination he testified that he did not have an agreement with her to charge her nothing unless he obtained more than \$50.00 for her, that he did not have any agreement standing with her relative to his fee, and that the amount of his fee was never mentioned at any time. Petitioner testified in the Bohemian language and her testimony was interpreted through an interpreter. Her direct evidence is that she will give it in full: "I live at 1715 Southmont St., Chicago."

I am the plaintiff in this case. I know Attorney Hart E. Baker. The first time I saw Mr. Baker was 1940. Mr. Levy [plaintiff's counsel]: I don't think she understood that.

Q. When was the first time that you first saw Mr. Baker?

Objection by Mr. Baker to repeating the question. The Master:

That's obviously an error. The Witness: 1940 we were there with Leo -- Mr. Levy: She doesn't get it. The Witness: 1934.

It was November, it was the 11th month. Mr. Strba went with me at that time. Q. What was said? A. I loaned money and I got a judgment. Then I was called to Karniks. They settled with me for \$500 and I refused that and when we came to Mr. Baker's office I told him that I already got the \$500 and I refused it. I explained everything about refusing the \$500 and he said this, that if he don't recover through court more than the \$500 then he will not charge -- will not ask anything from me, but if he should get over \$500 that he will charge for that, that he will take the case, and so I left it with him. Then I saw him in 1935 and Mr. Strba was with me. I asked him how the case is coming along, and he told me as long as the case rests, it is better for me. The next time I saw Mr. Baker I was with Mrs. Zach. That was sometime in the fall of 1935. After that I saw Mr. Baker again. Q. How often after that? A. Then my husband and Mr. Strba, they were waiting where Mr. Baker lives, on Halsted Street, near the library. It is on a corner. That was in 1936. At that time he told us the longer your case stands the better for you. I was in the office of Marcus Levy on March 7, 1941, at a pre-trial examination of Mr. Pavek and Mr. Karnik. I don't think Mr. Baker asked any questions of these witnesses on that day. I can't remember now. Since Mr. Baker has been my lawyer I gave him five tens, \$50. Q. Since November 22, 1940, have you ever asked Mr. Baker to render any services for you in connection with this case against Karnik? A. I did.

enjoined the burden of proof by a presumption of the evi-
dence her special defense.

Petitioner and Plaintiff were the sole witnesses that
testified as to what occurred at the time of the agreement
between the parties. Petitioner had been a practicing attorney
at the Chicago bar for many years. He had acted as assistant
state's attorney of Cook County and he had also represented the
Chicago Legal Aid Society, and he had testified to state that
he had nothing in the record to support the above testimony
of his counsel that she was by counsel for Plaintiff in her
brief. It is to the credit of petitioner that he was not
from exhibiting the content of Plaintiff's counsel in testimony
in for Plaintiff while acting as her counsel. Petitioner testi-
fied that he was first contacted by Plaintiff on April 1, 1934;
that she was brought to his office by a man named [redacted], who
acted as interpreter (Plaintiff is a foreign and apparently
unable to carry on a conversation in English); that Plaintiff,
through the interpreter, told petitioner about the defendant
and had obtained against Frank [redacted], and that defendant
proceedings which were instituted by her former attorney pro-
duced no results; that petitioner agreed to file a complaint
with the Plaintiff's name in his hands for the sum of \$50 to
cover court costs and expenses; that at no time did he have any
written or verbal agreement with Plaintiff as to the amount of
his fee. Upon cross-examination he testified that he did not
have an agreement with her to charge her nothing unless he ob-
tained more than \$50 for her, that he did not have any under-
standing with her relative to his fee, and that the amount of
his fee was never mentioned at any time. Plaintiff testified
in the Bohemian language and her testimony was interpreted
through an interpreter. Her direct evidence is short and so
will give it in full: "I live at 1715 Westmont St., Chicago.

I am the plaintiff in this case. I know Attorney Hart E. Baker. The first time I saw Mr. Baker was 1940. Mr. Levy [plaintiff's counsel]: I don't think she understood that. Q. When was the first time that you first saw Mr. Baker? Objection by Mr. Baker to repeating the question. The Master: That's obviously an error. The Witness: 1940 we were there with Leo -- Mr. Levy: She doesn't get it. The Witness: 1934. It was November, it was the 11th month. Mr. Strba went with me at that time. Q. What was said? A. I loaned money and I got a judgment. Then I was called to Karniks. They settled with me for \$500 and I refused that and when we came to Mr. Baker's office I told him that I already got the \$500 and I refused it. I explained everything about refusing the \$500 and he said this, that if he don't recover through court more than the \$500 then he will not charge -- will not ask anything from me, but if he should get over \$500 that he will charge for that, that he will take the case, and so I left it with him. Then I saw him in 1935 and Mr. Strba was with me. I asked him how the case is coming along, and he told me as long as the case rests, it is better for me. The next time I saw Mr. Baker I was with Mrs. Zach. That was sometime in the fall of 1935. After that I saw Mr. Baker again. Q. How often after that? A. Then my husband and Mr. Strba, they were waiting where Mr. Baker lives, on Halsted Street, near the library. It is on a corner. That was in 1936. At that time he told us the longer your case stands the better for you. I was in the office of Marcus Levy on March 7, 1941, at a pre-trial examination of Mr. Pavek and Mr. Karnik. I don't think Mr. Baker asked any questions of these witnesses on that day. I can't remember now. Since Mr. Baker has been my lawyer I gave him five tens, \$50. Q. Since November 22, 1940, have you ever asked Mr. Baker to render any services for you in connection with this case against Karnik? A. I did.

I am the plaintiff in this case. I know Attorney Baker. The first time I saw him, I saw him in 1940. [Plaintiff's counsel:] I don't think the defendant that. Q. When was the first time that you first saw Mr. Baker? Objection by Mr. Baker to repeating the question. The Master: That's obviously an error. The Master: I don't see there with Leo — Mr. Baker: This doesn't help. The Master: 1940. It was November, it was the fifth month. Mr. Baker went with me at that time. I don't know. I don't know. I got a judgment. Then I was called to court. They settled with me for \$500 and I released that in 1940. Baker's office told me that I didn't get the \$500 and I refused it. I explained everything about retaining the \$500 and he said that, that if he didn't recover through court more than the \$500 then he will not charge — will not be retaining from me, but if he should get over \$500 then he will charge for that, that he will take the case, and so I let it with him. Then I saw him in 1940 and Mr. Baker was with me. I asked him how the case is coming along, and he told me he lost the case twice, it is better for me. The next time I saw Mr. Baker I was with Mrs. Baker. That was sometime in the fall of 1940. After that I saw Mr. Baker again. Now often after that. Then my husband and Mr. Baker, they were sitting down Mr. Baker lives on Related Street, near the library. It is on a corner. That was in 1940. At that time he told me the longer your case stands the better for you. I was in the office of Mrs. Levy on March 7, 1941, at a practical examination of Mr. Baker and Mr. Kaminik. I don't think Mr. Baker asked any questions of these witnesses on that day. I don't remember now. When Mr. Baker has been my lawyer I gave him five tens, \$50. Since November 1940, have you ever asked Mr. Baker to render any services for you in connection with this case against Kaminik? A. I did.

Mr. Levy: I guess she doesn't understand the question. It is quite apparent. Q. Since November 22, 1940, did you ever ask Mr. Baker to render any services for you in connection with this case? A. He sent me a card and he went to Court.

Mr. Levy: I will withdraw the question. That's all." Mr. Strba accompanied plaintiff at the time of the alleged agreement and acted as an interpreter, but he was not called as a witness. It will be noted that during her short direct examination her counsel, when she made answers unsatisfactory to him, sought to avoid the effect of her answers by stating that she was unable to understand the questions. The verified second amended answer filed by her to the petition demonstrates that she is either a very ignorant woman or that she is utterly reckless in her sworn statements as to alleged facts. It would be, in our judgment, a grave injustice to petitioner to deprive him of a fee upon the testimony of plaintiff. She did not understand what petitioner said at the time of the alleged agreement, nor did petitioner understand what plaintiff stated at that time. As strba, who acted as her interpreter, was not called as a witness, how can it be reasonably argued that plaintiff by her testimony, alone, proved by a preponderance of the evidence that petitioner agreed that if he did not recover through court more than \$500 he would not charge plaintiff anything for his services? As to the delay in the trial of the creditor's bill case, petitioner stated that he was seeking to avoid a reference to a master because of the small amount involved and that he had told Judge Lupe that he would like to have the case heard by the court, without a reference. He further stated that he explained to Mr. Strba, when the latter called upon him to protest against the delay in the hearing of the proceeding, that the defendants would soon have to make a settlement, as the time for the renewal of the mortgage upon the property in question was drawing near.

erty in question was granted next.

proceeding, that the defendants would soon have to make a settlement, on the time for the removal of the mortgage upon the property.

the case heard by the court, without a reference. He further stated that he explained to Mr. Levy, when the latter called involved and that he had told Judge Levy that he would like to have to avoid a reference to a master because of the small amount involved in the creditor's bill case, petitioner stated that he was seeking anything for his services? As to the delay in the trial of through court more than \$500 he would not charge plaintiff evidence that petitioner agreed that if he did not recover title by her testimony, alone, proved by a preponderance of the called as a witness, how can it be reasonably argued that plain- at that time, as above, who acted as her attorney, was not agreement, nor did petitioner understand what plaintiff stated understand what plaintiff said at the time of the alleged him of a fee upon the testimony of plaintiff, who did not be, in our judgment, a grave injustice to petitioner to be negative reckless in her own statements as to alleged facts. It would she is either a very ignorant woman or that she is utterly amended answer filed by her to the petition does not state that was unable to understand the questions. The verified second sought to avoid the effect of her answers by stating that she tion her counsel, when she made answers contradictory to him, witness. It will be noted that during her direct examination sent and acted as an interpreter, but he was not called as a words accompanied plaintiff at the time of the alleged agree- Mr. Levy: I will answer the question. That's all, Mr. with this case. . . . he acted as a card and he went to court. and Mr. Levy: I guess she doesn't understand the question. It is quite correct. . . . since November 22, 1940, and for ever

Plaintiff contends that the service of the attorney's lien notice upon the attorney for the judgment debtor did not create an attorney's lien, for the reason that the service was not personal, as required by the statute, and that petitioner is not in a legal position to have a lien adjudicated to him, and therefore the instant judgment should be sustained. This point was raised before the master, and he made the following finding in reference to the same: "That the notice of attorney's lien was served upon the attorney for the defendants on November 6, 1940; that service of an attorney's lien on the judgment debtors, as provided by statute, is for the protection of the judgment debtors; that they have not raised any question of the sufficiency of the service of the notice of attorney's lien in this case; that the fund offered in settlement has not been disbursed by the judgment debtors, and they have notice of this proceeding, and that Anna Kusak has no ground for complaint that the notice was served on the attorney for the judgment debtors rather than on the judgment debtors themselves." This ruling by the master was correct and plaintiff filed no objection to any part of the master's report.

As to the amount of the fee that should be allowed petitioner: He claimed at the hearing before the master that he was entitled, as a reasonable fee for the services that he had rendered, \$250, and several attorneys gave testimony that supported this claim. However, on November 8, 1940, he wrote a letter to plaintiff, in which he stated, inter alia: "If you decide in the meantime to take the case out of my hands and give it to another lawyer, I will be willing to surrender this case if you will pay me my fee of \$125.00, which I feel is reasonable, and is computed upon the basis of the work which I have done, and the offer of settlement which I have been able to obtain." On November 22, 1940, Attorney Levy was

allowed by the court to enter his appearance as an additional counsel in the creditor's bill proceeding, and it is fairly clear that thereafter petitioner had little to do with the proceedings, and the \$25.50 that he still retains out of the \$50 paid him by plaintiff on account of costs and expenses is sufficient to compensate him for any services he may have rendered after Attorney Levy became an additional counsel for plaintiff.

The entire amount secured by plaintiff in the settlement was \$750, and we are of the opinion that, under all the circumstances, \$125, in addition to the said \$25.50, would be a reasonable fee to allow petitioner.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to enter a judgment allowing petitioner an attorney's lien in the amount of \$125.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

allowed by the court to enter his appearance as an additional
counsel in the creditor's bill proceedings, and it is clearly
clear that the creditor's bill proceedings had little to do with the pro-
ceedings, and the \$2,500 that he still retains out of the \$50
paid him by plaintiff on account of costs and expenses is there-
fore to compensate him for any services he may have rendered.
after Attorney Levy became an additional counsel for defendant.
The entire amount secured by plaintiff in his settlement
was \$750, and as one of the options that, under the terms of the
settlement, \$125, in addition to the said \$750, would be a reason-
able fee to allow defendant.

The judgment of the superior court in this matter is
reversed and the case is remanded with directions to the trial
court to enter a judgment allowing defendant an attorney's fee
in the amount of \$125.

WILLIAM J. SULLIVAN, J.,
Clerk of the Court.

Friend, W. J., and Sullivan, J., concur.

42751

JOHN HERTELY,
Appellant,

v.

MICHAEL TREMKO,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

465
3281A. 277²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a decretal judgment dismissing his amended complaint for want of equity plaintiff appeals.

The amended complaint consists of two counts. Count one alleges, inter alia, that by reason of the trust and confidence reposed by plaintiff in defendant, his lawyer, during the time the fiduciary relationship of lawyer and client existed between them, defendant caused plaintiff, by misrepresentations, fraud and deceit, to invest in a certain second mortgage and delivered to plaintiff a worthless \$4,000 note, dated April 23, 1931, due on or before two years after date, and a trust deed securing the same, and induced plaintiff to surrender to him \$4,000 in payment thereof; that, by reason of the aforesaid, plaintiff has been damaged in the sum of \$3,800, with interest thereon from September 1, 1931, to date. The second count alleges, inter alia, that on September 19, 1931, defendant borrowed \$3,400 from plaintiff and gave him as security therefor promissory notes executed by defendant and his wife; that about August 20, 1941, there remained due a balance of \$2,600; that defendant, by false representations, induced plaintiff to surrender to him said notes for \$1,100; that, by reason of the aforesaid, plaintiff has been damaged in the sum of \$1,500, with interest thereon from August 20, 1941, to date.

Plaintiff contends that the evidence shows that "the fiduciary relation of attorney and client existed at the time defendant sold his property [a second mortgage note] to plaintiff and at the time he borrowed money from plaintiff," and,

JOHN G. KELLY, JR.
Plaintiff,
v.
MICHAEL T. KELLY, JR.
Defendant.

From a decretal judgment of the court, the plaintiff is entitled to the sum of \$10,000 for want of equity plaintiff alleges.

The decretal judgment consists of two parts, the first part alleges, inter alia, that by reason of the trust and confidence reposed by defendant in plaintiff, the latter, during the time the fiduciary relationship of lawyer and client existed between them, obtained certain property, by misrepresentation, fraud and deceit, to invest in a certain second mortgage and delivered to plaintiff a mortgage, dated April 23, 1931, and on or before two years after date, and a trust deed securing the same, and induced plaintiff to surrender to him \$4,000 in payment thereof; that, by reason of the foregoing, plaintiff has been damaged in the sum of \$4,000, with interest thereon from September 1, 1931, to date. The second part alleges, inter alia, that on September 12, 1931, defendant borrowed \$3,400 from plaintiff and gave him as security therefor promissory notes executed by defendant and his wife; that about August 20, 1931, there remained on a balance of \$2,000; that defendant, by false representations, induced plaintiff to surrender to him said notes for \$1,100; that, by reason of the foregoing, plaintiff has been damaged in the sum of \$1,500, with interest thereon from August 20, 1931, to date. Plaintiff contends that the evidence shows that "the fiduciary relation of attorney and client existed at the time defendant sold his property [a second mortgage note] to plaintiff and at the time he borrowed money from plaintiff," and

therefore, "the burden of proof was on the defendant to show the perfect fairness, adequacy and equity of the transactions," and "the defendant having failed to meet the burden of proving by a preponderance of the evidence the fairness, adequacy and equity of his dealings with the plaintiff, the transactions are fraudulent and void and should be set aside," and judgment should be entered for plaintiff, as to count one, for the amount of the mortgage less \$200, plus interest at the rate of five per cent per annum from the date defendant received the money to date; and as to count two plaintiff suffered a loss of \$600 on his loan to defendant and is entitled to judgment for that amount plus interest thereon at the rate of five per cent per annum from September, 1940, to date.

As to count one defendant contends that the chancellor was justified, under the evidence, in finding that defendant did not make any of the misrepresentations alleged in the amended complaint. As to count two defendant contends that the indebtedness had been running for a great many years and that in September, 1940, he had made payments on the indebtedness that reduced the indebtedness to under \$1,000; that on said date a dispute existed in good faith between him and plaintiff as to what the amount of the balance of the loan was; that he claimed it was under \$1,000 and plaintiff claimed it was \$1,700 and that a compromise was then made whereby he paid plaintiff \$1,300 in satisfaction of the matter; that plaintiff then and there turned over to defendant the notes, and they were destroyed.

Plaintiff was born in Slovakia but has lived in the United States for forty-four years. He lived in Chicago for many years and in 1933 he bought a farm in Michigan and has since lived there. He speaks and understands the American

therefore, "the burden of proof was on the defendant to show the perfect fairness, adequacy and equity of the transactions," and "the defendant having failed to cast the burden of proving a preponderance of the evidence in its favor, equity and justice require that the plaintiff, the transactions in question and the fact that should be set aside," and judgment should be entered for plaintiff, as to count one, for the amount of the mortgage loan plus interest at the rate of five per cent per annum from the date defendant received the money to date; and as to count two plaintiff recovered a loss of \$500 on his loan to defendant and is entitled to judgment for that amount plus interest thereon at the rate of five per cent per annum from September, 1940, to date.

As to count one defendant contends that the transaction was justified, under the evidence, in finding that defendant did not make any of the misstatements alleged in the amended complaint. As to count two defendant contends that the indebtedness has been running for a great many years and that in September, 1940, it was paid in full on the indebtedness that produced the indebtedness in August, 1940; that on said date a dispute existed in fact between him and plaintiff as to what the amount of the balance of the loan was; that he claimed it was under \$1,000 and plaintiff claimed it was \$1,700 and that a compromise was then made whereby he paid plaintiff \$1,300 in satisfaction of the debt; that plaintiff then and there turned over to defendant the notes, and they were destroyed.

Plaintiff was born in Slovakia and has lived in the United States for forty-four years. He lived in Chicago for many years and in 1937 he bought a farm in Michigan and has since lived there. He speaks and understands the American

language but understands the Slovak language better. Defendant is of the same nationality as plaintiff and in all talks between plaintiff and defendant they used the Slovak language. On December 7, 1936, defendant became a judge of the Municipal court of Chicago and has since occupied that position. While it is true, as defendant contends, that plaintiff testified that the last time defendant acted as his attorney was in 1933, there is evidence that tends to show that the relationship of attorney and client may have continued for a number of years thereafter, and for the purposes of this appeal we may assume the existence of such relationship. This case was tried by an able chancellor, who found, from the evidence, that there were no misrepresentations made by defendant in the matter of the sale of the mortgage to plaintiff in 1931; and further found, as to count two, that there was a bona fide dispute between the parties as to the amount that defendant owed upon the loan, and that the parties compromised and adjusted their differences by agreeing on a figure of \$1,300, which amount was paid by defendant to plaintiff and accepted by plaintiff in full settlement of his claim. After a careful examination of the evidence we have reached the conclusion that the chancellor was justified in his findings. At the outset it must be noted that plaintiff did not commence the instant proceedings until eleven years after the transaction involved in count one.

As to count one: It appears that plaintiff, in 1926, ~~about~~ and prior to the time that defendant represented him as a lawyer, speculated in second mortgages because of the high rate of interest that was paid upon same and because he also received "commissions" when he bought one. The chancellor also examined plaintiff upon that subject and developed that before he had any dealings with defendant he bought a

language but understood the lower language better. The
language is of the same nationality as plaintiff and in all
cases between plaintiff and defendant they used the lower
language. On December 7, 1930, defendant became a judge of
the municipal court of Chicago and has since occupied that
position. While it is true, as defendant contends, that
plaintiff testified that the last time defendant met him
his attorney was in 1925, there is evidence that prior to
that time the relationship of attorney and client may have
continued for a number of years previous, and for the pur-
poses of this trial we may assume the relationship of such
relationship. This case was tried by an able jurist,
who found, from the evidence, that there was no interrup-
tion of the relationship in the matter of the sale of
the property to plaintiff in 1925 and previous years, and so
count two, that there was a continuing relationship between the
parties as to the amount that defendant owed upon the loan,
and that the parties complied with the usual legal obligations
by agreeing on a figure of \$1,500, which amount was paid by de-
fendant to plaintiff and accepted by plaintiff as full satis-
faction of his claim. After a careful examination of the evi-
dence we have reviewed the conclusion that the transaction was
justified in the findings. It was noted that it was noted that
plaintiff did not commence the instant proceedings until eleven
years after the transaction involved in count one.
As to count one: It appears that plaintiff, in 1925, received
and prior to the time that defendant represented him as a lawyer,
specialized in second mortgages because of the high rate of
interest that was paid upon same and because he also re-
ceived "commissions" when he bought one. The commission
also explained, plaintiff upon that subject and developed
that before he had any dealings with defendant he bought

second mortgage that was paid a year after he bought it and upon which he realized not only the principal but six per cent interest and three per cent for commission. The record shows that plaintiff was not a stranger to deals involving real estate. As to the misrepresentations alleged to have been made by defendant in the matter of the sale of the mortgage to plaintiff in 1931: The amended complaint, verified by plaintiff, alleges that defendant represented to plaintiff "that one of his clients had a good second mortgage in the sum of \$4,000 for sale; that the mortgage was merchantable; that the real estate securing said mortgage indebtedness was worth \$80,000; that there was a first mortgage on said premises in the sum of \$18,000; that the mortgagors were people who owned considerable property; that they were solvent, and that the mortgage was a safe investment." Upon his direct examination plaintiff's testimony as to the alleged misrepresentations is as follows: "Well, Mr. Tremko tell me he has got a pretty good place and them people wants four thousand dollars for a second mortgage; that mortgage look like gold, pretty good place, and I get income from that place, all of them flats is rented out, and he say pretty good income. And I told him if it had a pretty good income, all right. I put four thousand dollars. There is so many flats up there, I don't know how many flats." Upon cross-examination plaintiff testified: "I had one talk with Mr. Tremko before I paid over the money, about this building. That talk was in his office which I told you about. After eleven years my memory is clear about what was said in that talk. We talked one hour in the Slovak language, just the two of us. The Damen Avenue property was the only thing we talked about that night. He told me the mortgage was good as gold. I don't remember anything else he told me that time. The following Saturday he took me out and

looked at the property and about a week later I paid over the money. In about thirty days after that I got the papers. That is all I remember about the conversation at that time." It will be noted that the conversation took place on September 1, 1931, and that plaintiff did not testify until March 18, 1943. After defendant had rested his case plaintiff was called by his counsel, in rebuttal. The counsel then asked plaintiff if in the talk that he had with Judge Tremko in 1931, when he bought the Kmilek mortgage, ~~xx~~ anything was said by Judge Tremko about the taxes on the property. Counsel for defendant objected to the question upon the ground that plaintiff in his original case had been asked upon direct examination and upon cross-examination to give the entire conversation and that he had done so, and that the proposed testimony was not rebuttal testimony and was otherwise incompetent evidence. The court, however, allowed the witness to answer, and he answered that there ^{was} nothing said in the conversation about taxes. Plaintiff was further allowed to testify that during the conversation Judge Tremko told him that \$18,000 was the amount of the first mortgage. The trial court called attention to the fact that plaintiff had told the whole story on cross-examination and direct examination and that counsel for plaintiff was putting leading and suggestive questions to the witness, but he allowed the questions to be answered. The following then occurred: "Q. Wait a minute. Do you remember anything being said by Judge Tremko about who was the owner of this mortgage? Mr. Elward [attorney for defendant]: Objection, your Honor. A. No. The Court: You went over that on direct examination. I remember it very well. Mr. Elward: It is leading and suggestive, and it has been gone over before. Mr. Jewett [attorney for plaintiff]: Q. I will ask you this question. Do you remember anything being said by Judge Tremko at that talk about what the \$4000 you gave him

looked at the property and about a week later I paid over the money. In about thirty days after that I got the property. That is all I remember about the conversation at that time."

It will be noted that the conversation took place on September 1, 1931, and that Plaintiff did not testify until March 12, 1943. After defendant had rested his case Plaintiff was called by his counsel, in rebuttal. The counsel then asked Plaintiff if in the talk that he had with Judge Frank in 1931, when he bought the Miller mortgage, ~~any~~ anything was said by Judge Frank about the taxes on the property. Counsel for defendant objected to the question upon the ground that Plaintiff in his original case had been asked upon direct examination and upon cross-examination to give the entire conversation and that he had done so, and that the proposed testimony was not material testimony and was otherwise incompetent evidence. The court, however, allowed the witness to answer, and he answered that ^{was} nothing said in the conversation about taxes. Plaintiff was further allowed to testify that during the conversation Judge Frank told him that \$10,000 was the amount of the first mortgage. The trial court called attention to the fact that Plaintiff had told the whole story on cross-examination and direct examination and that counsel for Plaintiff was putting leading and suggestive questions to the witness, but he allowed the question to be answered. The following then occurred: "Q. Just a minute. Do you remember anything being said by Judge Frank about the owner of this mortgage? A. Yes, the Court: You want over that on direct examination. I remember it very well, Mr. Frank: It is leading and suggestive, and it has been gone over before. A. I will ask you this question. Do you remember anything being said by Judge Frank at that time about the \$1000 you gave him

for that mortgage was to be used for? A. He -- Mr. Elward: I object to that. It is leading and suggestive. It has already been gone over. The Court: I will let him answer. Mr. Jewett: Read the question. (Question read.) A. Yes, he told me from that money, when I get it to him, \$4000, use it for repair that building, because everything upside down in there. That is all I know." Nowhere in plaintiff's evidence does he refer to the alleged misrepresentation "that the real estate securing said mortgage indebtedness was worth \$80,000," nor did he state upon his direct or cross-examination when he first testified that defendant told him that \$18,000 was the amount of the first mortgage. In his amended complaint he alleges that the Kmilek mortgage consisted of one note for \$4,000. In his testimony he stated that it was his recollection that there were forty notes of \$100 each on the Kmilek Damen avenue property. After the noon recess he stated, "This morning I said I thought there were forty notes of \$100 each on the Kmilek mortgage. I am not sure, I don't remember if there were forty notes or one note." There are other contradictions and differences in plaintiff's testimony, but it would unduly lengthen this opinion to refer to all of them. Defendant testified that before plaintiff purchased the Kmilek mortgage he and plaintiff had a conversation in defendant's office in the Slovak language and plaintiff made a physical examination of the property; that defendant drove plaintiff to the place in his car and they went through the property together; that it was daylight at the time; that plaintiff lived within walking distance of the property; that he told plaintiff there was a \$27,000 mortgage on the property that was held by an insurance company somewhere in Pennsylvania, and he further told him that there was \$2,000 due in taxes, maybe \$2,500; that he did not tell him anything about the value of the building; that he told plaintiff that the mortgage was for the face value

for that mortgage was to be used for A. He -- Mr. Edwards:

I object to that. It is leading and suggestive. It has already been gone over. The Court: I will let him answer.

Mr. Jewett: I asked the question. A. Yes, he told me from what money, when I got it to him, \$4000, use it for repair that building, because everything upstairs down in there. That is all I know. "I know in Plaintiff's evidence goes he refer to the alleged misrepresentation that the real estate accounting said mortgage in fact was worth \$30,000," now did he state such in direct or cross-examination when he first testified that defendant told him that \$18,000 was the amount of the first mortgage. In his amended complaint he alleges that the first mortgage consisted of one note for \$4,000. In his testimony he stated that it was his recollection that there were forty notes of \$100 each on the English Avenue property. After the noon recess he stated, "This morning I said I thought there were forty notes of \$100 each on the English Avenue. I am not sure, I don't remember it there were forty notes on one note." There are other contradictions and differences in Plaintiff's testimony, and it would hardly lengthen this opinion to refer to all of them. Defendant testified that before Plaintiff purchased the English mortgage he and Plaintiff had a conversation in defendant's office in the above language and Plaintiff made a physical examination of the property; that defendant drove Plaintiff to the place in his car and they went through the property together; that it was daylight at the time; that Plaintiff lived within walking distance of the property; that he told Plaintiff there was a \$27,000 mortgage on the property that was held by an insurance company somewhere in Pennsylvania, and he further told him that there was \$2,000 due in taxes, maybe \$2,500; that he did not tell him anything about the value of the building; that he told Plaintiff that the mortgage was for the face value

of \$4,000, but that he, defendant, held the mortgage and he would allow plaintiff a discount of five per cent, or \$200, upon the purchase; that he did not state to plaintiff that the real estate securing the mortgage indebtedness was worth \$80,000 and that he did not state to him that there was a first mortgage on the premises in the sum of \$18,000; that there were sixteen apartments in the property. When defendant was called by plaintiff, under sec. 60 of the Civil Practice Act, he testified that at the time of the sale of the mortgage in question plaintiff had a number of second mortgages; that "he has been in that line of business, buying and selling * * *, but he has been looking for high rates of interest. I don't know where he got half of them and I don't know where he got the money." We are satisfied that we would not be justified in setting aside the finding of the chancellor that there were no misrepresentations made by defendant in the matter of the sale of the mortgage to plaintiff.

As to plaintiff's claim under count two: It would unduly lengthen this opinion to state the evidence that bears upon this claim. As we read this record, it appears clear from the evidence that there was a bona fide dispute between plaintiff and defendant as to the amount that was due on the loan, defendant contending that the \$3,400 principal of the original loan had been reduced ~~xxxxxxxxxx~~ to an amount under \$1,000 by checks that he had given plaintiff. Defendant testified that during the dispute he stated that he thought there was \$900 due and plaintiff stated that he thought there was \$1,700 due. Upon the witness stand plaintiff seemed to claim that there was \$1,900 due him. He testified that he had no record as to how much plaintiff paid him or the different times he paid him; that he had nothing "in black and white by which we can figure out what was due then." Plaintiff further testified

of \$4,500, but that he, defendant, held the mortgage and he would allow plaintiff a discount of five per cent, or \$225, upon the purchase; that he did not state to plaintiff that the real estate securing the mortgage indebtedness was worth \$80,000 and that he did not state to him that there was a first mortgage on the premises in the sum of \$15,000; that there were sixteen apartments in the property. When defendant was called by plaintiff, under sec. 80 of the Civil Practice Act, he testified that at the time of the sale of the mortgage in question plaintiff had a number of second mortgages; that "he has been in that line of business, buying and selling mortgages, but he has been looking for high rates of interest. I don't know where he got half of them and I don't know where he got the money." He was satisfied that he would not be benefited in setting aside the finding of the chancellor that there were no assignments made by defendant in the matter of the sale of the mortgage to plaintiff.

As to plaintiff's claim under count two: It would hardly lengthen this opinion to state the evidence that bears upon this claim. As we read this record, it appears clear from the evidence that there was a loan made by plaintiff and defendant as to the amount that was loaned on the loan, defendant contending that the \$2,400 principal of the original loan had been reduced ~~to an amount under \$1,000~~ by checks that he had given plaintiff. Defendant testified that during the dispute he stated that he thought there was \$2,000 due and plaintiff stated that he thought there was \$1,700 due. Upon the witness stand plaintiff seemed to state that there was \$1,900 due him. He testified that he had no record as to how much plaintiff paid him on the different times he paid him; that he had nothing "in black and white" by which he can figure out what was due them." Plaintiff further testified

as to various payments made by defendant upon the loan but we find it difficult, in reading his testimony, to determine the exact items that he claims were paid him. There is no question but that the parties, after a lengthy discussion, agreed to compromise their differences and that they agreed upon \$1,300, and it is clear that defendant paid plaintiff that amount. It is somewhat significant that in plaintiff's verified complaint he alleges that he received from defendant, in payment of the notes, \$1,100. After the settlement, the parties went downstairs to a tavern and spent an hour there in friendly intercourse. There is merit in defendant's contention that the claim under count two is an afterthought.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

as to various payments made by defendant upon the loan but he
finds it difficult, in reaching his conclusion, to determine the
exact items and the claims were paid him. There is no question
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notes, \$1,100. After the settlement, the parties went down-
stairs to a tavern and spent an hour there in friendly inter-
course. There is much in defendant's contention that the
claim under count two is an overstatement.

The judgment of the circuit court of this county is

affirmed.

WILLIAM H. HARRIS,

Plaintiff, v. J. J. and William H. Harriss, Jr., defendants.

42766

AMBER FURNITURE CO.,
a corporation,

Appellee,

v.

KESSEL BROTHERS STORAGE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

3231.A. 278

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in tort brought for the value of certain furniture alleged to have been converted by defendant to its own use. The case was tried by the court and at the conclusion of the evidence defendant was found guilty and plaintiff's damages were assessed at \$398. Defendant appeals from a judgment entered upon the finding.

Plaintiff's amended statement of claim alleges that on June 24, 1937, and at all times thereafter it was the owner and entitled to the possession of certain items of furniture; that subsequently defendant came into possession thereof; that about February 13, 1942, plaintiff demanded said goods of defendant but the latter refused to surrender same and converted same to its own use and thereby plaintiff was damaged in the sum of \$500. Defendant, in its defense, denies, inter alia, that plaintiff made a demand upon defendant to return the goods; denies that it converted plaintiff's property; states that on November 16, 1938, one Katie Buck deposited with defendant, a licensed warehouseman, certain goods for which defendant issued its warehouse receipt; that defendant had no knowledge that the goods were the same as those mentioned in the statement of claim; that on January 12, 1942, defendant sold the goods stored with it for its charges, pursuant to ch. 114, sec. 265, Ill. Rev. Stat. 1941, and before February 13, 1942, delivered them to the purchaser. Plaintiff, in its reply to the affirmative allegations of the defense,

114

8881 A 278

ANNE HARRISON CO.,
 a corporation,
 Appellee,
 v.
 HESS & BROTHERS STORAGE
 COMPANY, a corporation,
 Appellant.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

An action in tort brought for the value of certain
 furniture alleged to have been converted by defendant to
 its own use. The case was tried by the court and at the
 conclusion of the evidence defendant was found guilty and
 plaintiff's damages were assessed at \$700. Defendant
 appeals from a judgment entered upon the finding.
 Plaintiff's amended statement of claim alleges that
 on June 24, 1937, and at all times thereafter it was the
 owner and entitled to the possession of certain items of
 furniture; that subsequently defendant came into possession
 thereof; that about February 13, 1941, defendant demanded
 said goods of defendant but the latter refused to surrender
 same and converted same to its own use and thereby plaintiff
 was damaged in the sum of \$700. Defendant, in its defense,
 denies, *inter alia*, that plaintiff made a demand upon defend-
 ant to return the goods; denies that it converted plaintiff's
 property; states that on November 12, 1938, one Katie Brock
 deposited with defendant, a licensed warehouseman, certain
 goods for which defendant issued its warehouse receipt; that
 defendant had no knowledge that the goods were the same as
 those mentioned in the statement of claim; that on January 12,
 1941, defendant sold the goods stored with it for its charges,
 pursuant to §§ 114, 202, 111, Rev. Stat. 1941, and before
 February 13, 1942, delivered them to the purchaser, Plaintiff,
 in its reply to the affirmative allegations of the defense.

states that it had no knowledge as to Katie Buck's depositing goods with defendant, and asks strict proof thereof; that it neither admits nor denies defendant's sale of the stored goods for its charges, but demands strict proof thereof, and that it neither admits nor denies the delivery by defendant of the sold goods to the purchaser. In a second amended statement of claim plaintiff alleges the conversion by defendant of only a part of the goods listed in the amended statement of claim.

On June 24, 1937, Ralph Bayer, an employee of plaintiff in one of its retail furniture stores, sold to Mrs. Derker, the operator of a house of prostitution, various items of furniture for a total price of \$728.29. The terms of payment agreed upon were \$50 cash, \$75 C. O. D., and twelve monthly payments of \$51.10, with a final payment falling due on June 26, 1938. About a year after that sale Mrs. Derker bought from plaintiff certain additional furniture. Plaintiff claims that on June 24, 1937, Mrs. Derker executed a conditional sales contract for the goods purchased by her of plaintiff, but that she signed the contract in the name of James Derker. An alleged conditional sales contract admitted in evidence is dated June 24, 1937, and is signed James Derker; it purports to cover all of the goods purchased in 1937 and 1938. On November 16, 1938, one Katie Buck, also known as Mrs. James Derker, stored in defendant's warehouse a lot of household goods. As she did not pay defendant the storage charges, after notice to Katie Buck the goods stored were sold by defendant, on January 12, 1942, under the statute, to satisfy defendant's lien for storage charges. The goods were sold for less than the balance due defendant.

Plaintiff's claim is based upon the alleged conditional sales contract. Many points are urged by defendant why the in-

stated that it had no knowledge as to Katie Buck's depositing goods with defendant, and also stated that it was not aware of the fact that defendant had sold the goods for its charges, but demands that it be paid for the goods. Defendant also denies the delivery by defendant of the sold goods to the purchaser. In a second amended statement of claim plaintiff alleges the conversion by defendant of only a part of the goods listed in the original statement of claim.

On June 24, 1937, John Dwyer, an employee of plaintiff in one of its retail furniture stores, sold to Mrs. Barker, the operator of a house of prostitution, various items of furniture for a total price of \$75.00. The terms of payment agreed upon were \$20 cash, \$55.00 in three monthly payments of \$18.33, with a final payment falling due on June 26, 1938. About a year after that sale Mrs. Barker bought from plaintiff certain additional furniture. Plaintiff alleges that on June 24, 1937, Mrs. Barker executed a conditional sales contract for the goods purchased by her of plaintiff, but that she signed the contract in the name of James Barker, an alleged conditional sales contract, which is in evidence is dated June 24, 1937, and is signed James Barker; it purports to cover all of the goods purchased in 1937 and 1938. On November 10, 1938, one Katie Buck, also known as Mrs. James Barker, stored in defendant's warehouse a lot of household goods. She did not pay defendant the storage charges, after notice to Katie Buck the goods stored were sold by defendant, on January 12, 1942, under the statute, to satisfy defendant's lien for storage charges. The goods were sold for less than the balance due defendant. Plaintiff's claim is based upon the alleged conditional sales contract. Many points are urged by defendant in the in-

stant judgment should be reversed but in our view of this case we need consider only one contention it raises, viz., that in order to make out a case plaintiff was obliged to establish the execution of the alleged conditional sales contract; that the sole testimony introduced by plaintiff to establish the said execution was that of Irene Kuhl and that her testimony is shown to be unworthy of belief. We are satisfied, after a careful examination of the evidence, that this contention is a meritorious one. Plaintiff first undertook to prove the execution of said contract by Ralph Bayer. That Bayer sold Mrs. James Derker certain furniture on June 24, 1937, is not disputed. Upon the direct examination of Bayer counsel for plaintiff showed the witness the alleged conditional sales contract and attempted to show by the witness that he saw Mrs. Derker sign the contract, but the witness failed to so testify. Upon the cross-examination the following occurred: "Q. Mr. Bayer, you looked over this contract when counsel showed it to you. Is it in the same condition now as it was when it was signed? A. Well, when I -- Could I see that again, please? Mr. Fine [attorney for defendant]: Certainly. A. No, it is not. Q. In what respect is it changed from the way it was when you saw it signed? A. Well, when the contract was originally signed it was blank. Q. Nothing at all was on it besides the signature -- is that right? A. Yes, that is right. Q. Do you know when it was filled in? A. No, I don't. Q. Do you know how it got filled in? A. No sir. Q. Do you know who filled it in? A. No, sir." Upon further cross-examination the following occurred: "Q. And did you see Katie Derker sign 'James Derker'? A. No, I did not. Q. You did not see her sign it? A. No, I did not. Q. Then how do you know it is her signature? A. Well, I would not know by looking at this. Q. In other words, you could not identify that document as being the document executed by Katie Derker, is that right? A. No, I cannot." Plaintiff's

stant judgment should be reversed but in our view of this case we need consider only one contention it raises, viz., that in order to win out a case plaintiff was obliged to establish the execution of the alleged conditional sales contract; that the sole testimony introduced by plaintiff to establish the said execution was that of James Baker and that his testimony is shown to be unworthy of belief. We are assisted, after a careful examination of the evidence, that this contention is a victorious one. Plaintiff first undertook to prove the execution of said contract by Ralph Baker. That Baker said Mrs. James Baker certain furniture on June 24, 1937, is not disputed. Upon the direct examination of Baker counsel for plaintiff showed the witness the alleged conditional sales contract and attempted to show by the witness that he saw Mrs. Baker sign the contract, but the witness failed to testify. Upon the cross-examination the following occurred: "Q. Mr. Baker, you looked over this contract when counsel showed it to you. Is it in the same condition now as it was when it was shown to A. Baker, when I -- could I see that again, please? The testimony for defendant: Certainly. A. No, it is not. Q. In what respect is it changed from the way it was when you saw it signed? A. Well, when the contract was originally signed it was blank. Q. Nothing at all was on it before the signature -- is that right? A. Yes, that is right. Q. Do you know when it was filled in? A. No, I don't. Q. Do you know how it got filled in? A. No, sir. Q. Do you know who filled it in? A. No, sir." Upon further cross-examination the following occurred: "Q. And did you see Eddie Barker sign 'James Barker'? A. No, I did not. Q. You did not see her sign it? A. No, I did not. Q. Then how do you know it is her signature? A. Well, I would not know by looking at this. Q. In other words, you could not identify that document as being the document executed by Eddie Barker, is that right? A. No, I cannot." Plaintiff's

counsel concede that they failed to prove the execution of the contract by Bayer and that it was necessary to prove it by another witness, and they contend that they then called Irene Kuhl to prove the execution of the contract and that she testified that she saw Mrs. Derker sign the contract and that at the time of the trial it was in exactly the same condition as it was when it was executed. Irene Kuhl was a daughter-in-law of Mrs. Derker. Irene Kuhl testified that she had been at Mrs. Derker's house every day for almost eight years and that she took care of Mrs. Derker's furniture; that she was with Mrs. Derker when she bought the furniture on June 24, 1937; that she saw Mrs. Derker sign the name James Derker to the contract and that the contract shown her is in the same condition as when Mrs. Derker signed it; that all of the items that appear in the contract were in it when it was signed and they were exactly the same then as they are in the contract that is shown her. The falsity of this testimony not only appears from the testimony of Bayer but from certain other evidence in the case that demonstrates that of the nineteen items that appear in the alleged contract introduced by plaintiff six items were not sold by plaintiff to Mrs. Derker until June 27, 1938. A careful examination of her testimony shows that Irene Kuhl was willing to testify to anything that she thought would aid plaintiff's case. She testified that she was in Mrs. Derker's home when plaintiff delivered all of the furniture purchased; that on November 16, 1938, she saw defendant's van pick up the furniture, and she helped pack the furniture; that the furniture that the van picked up was the same furniture that Mrs. Derker purchased from plaintiff, and that it was then in very good condition because she had taken care of it for Mrs. Derker; that the furniture was put in storage in defendant's warehouse; that Mrs. Derker never got back from defendant any part of the furniture. Plaintiff's counsel deemed it necessary to prove notice to

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the matter of the application of the National Board of Health for the purpose of securing the removal of the National Board of Health from the Department of the Interior. I am sorry to hear that the National Board of Health is not satisfied with the action of the Department of the Interior in this matter. I am sure that the National Board of Health will be satisfied with the action of the Department of the Interior in this matter. I am sure that the National Board of Health will be satisfied with the action of the Department of the Interior in this matter.

defendant of plaintiff's conditional sales contract, so Irene Kuhl testified that she went to defendant's warehouse in January, 1942, and offered to pay defendant money to hold off the sale a while but they ignored her and said it was too late; that her father-in-law was with her at the time and that he told someone in the office of defendant, "If you sell it, you will get in trouble;" that the man they talked to said he was the manager of defendant and that her father-in-law told him, "If you sell this furniture you are selling mortgaged property; if you sell it you will get in trouble." Irene Kuhl further testified that she knew that Mrs. Derker did not pay in full for the furniture that she bought from plaintiff and for which she gave the conditional sales contract because she used to make the payments for Mrs. Derker. James Derker was not called as a witness. Morton Kessel, vice president of defendant company, testified that Mrs. Kuhl never came to the warehouse before the sale and that defendant had no notice of any kind before the sale that plaintiff had any interest whatsoever in the goods; that on December 16, 1941, there was a balance of \$327.25 due defendant from Katie Buck for storage charges and that he sent notices by registered mail to Katie Buck that if the amount due was not paid on or before December 15, 1941, the goods would be advertised for sale and sold at public auction at defendant's warehouse on January 12, 1942, at 10 a.m.; that defendant had two addresses of Katie Buck, so a notice was sent to each address by registered mail; that there were no payments made by Katie Buck or by anybody else after the notice of sale; that on January 12, 1942, the goods of Katie Buck stored with defendant were sold at auction to a purchaser for \$225.

The trial court should have found that there was no credible evidence introduced as to the execution of the conditional sales contract and should have further found that there was no credible evidence that tended to show notice to defendant

defendant of plaintiff's conditional sales contract, as Irene
will testify that she went to defendant's warehouse in January,
1942, and offered to pay defendant money to hold off the sale a
while but that, ignoring her offer, it was the latter that her
father-in-law was with her at the time and that he told someone
in the office of defendant, "You sell it, you will get in
trouble"; that the man then failed to inform her the manager of
defendant and that her father-in-law told her, "You sell this
thing, you are selling mortgaged property; if you sell it you
will get in trouble." Irene will further testify that she knew
that Mrs. Barker did not pay in full for the furniture that she
bought from plaintiff and the reason she gave the conditional sales
contract before she died to make the payment for Mrs. Barker.
James Barker was not called as a witness. Boston County, also
president of defendant company, testified that Mrs. Barker never
came to the warehouse before the sale and that defendant had no
notice of any kind before the sale that plaintiff had any interest
whatsoever in the goods; that on December 12, 1941, there was a
balance of \$117.12 due defendant from plaintiff for storage
charges and that he sent notices of collection to the Buck
that if the amount was not paid on or before December 12, 1941,
the goods would be sold for sale and that at plaintiff's request
at defendant's warehouse on January 12, 1942, at 10 a.m.; that
defendant had two releases of the truck, one a notice was sent
to each address of registered sale; that there were no payments
made by Katie Buck or by anybody else after the notice of sale;
that on January 12, 1942, the goods of Katie Buck stored with
defendant were sold at auction to a purchaser for \$25.
The trial court should have found that there was no
credible evidence introduced as to the execution of the condi-
tional sales contract and should have further found that there
was no credible evidence that tended to show notice to defendant

that plaintiff claimed to have a conditional sales contract covering the furniture in question. In this connection it must be noted that Irene Huhl's testimony as to the alleged notice does not show any notice to defendant of the alleged conditional sales contract, nor that plaintiff has any interest in the goods, and that she states that the person to whom she talked at the warehouse "said it was too late."

It would amount to a miscarriage of justice, in our opinion, to allow the instant judgment to stand. The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

It would seem to a disinterested observer, in my opinion, to allow the latest judgment to stand. The judgment of the Criminal Court of Chicago is reversed.

1. The first of these is the fact that the

42272

JEAN MARLOWE,
Appellant,

v.

CHICAGO TITLE AND TRUST
COMPANY, a corporation,
as Trustee under Liquidating
Trust No. 30081,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

323 I.A. 278

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Jean Marlowe, to recover \$5,000, which she had deposited with defendant, Chicago Title and Trust Company, as trustee, with her written offer to purchase certain real estate and personal property. Trial was had by the court without a jury and finding and judgment were entered against plaintiff, who appeals from said judgment.

Plaintiff's offer to purchase was contained in a letter, the pertinent portions of which are as follows:

"To:--

Chicago, Ill. Aug. 15, 1938

Chicago Title and Trust Company
as Trustee under liquidating Trust
No. 30081, and not personally.

The undersigned hereby offers to purchase the premises owned by you, known as 20 East Delaware in Chicago in the County of Cook, State of Illinois *** for \$350,000 payable all in cash.

Personal property used in connection with the operation of said premises, which is situated therein and owned by you at the time of delivery of deed shall thereupon be transferred to the undersigned.

The undersigned deposits herewith \$5,000. You shall have thirty-five days within which to accept this offer, and if not accepted by you within said time the deposit shall be returned to undersigned upon written request.

If this offer is accepted by you, and the undersigned does not within sixty days after such acceptance complete the cash payment and execute and deliver the instruments above required to be executed by undersigned, the deposit shall be retained by you as liquidated damages.

The sale shall be closed at your office, through escrow under Chicago Title and Trust Company's customary form of escrow agreement and undersigned shall pay the cost of such escrow, but not to exceed \$250.

This offer and any acceptance thereof by you is subject

that plaintiff claims to have a conditional sales contract
covering the furniture in question. In this connection it
must be noted that there exists the fact that as the alleged
notice does not show any notice to defendant of the alleged
conditional sales contract, nor that plaintiff has any
interest in the goods, and that the goods were the person
to whom she claimed at the warehouse sale it was too late.
It would amount to a disclaimer of justice, in our
opinion, to allow the instant judgment to stand. The judg-
ment of the appellate court of Illinois is reversed.
JULIUS ROSENBERG.

Friend, W. L., and William, J., consent.

42272

JEAN MARLOWE,
Appellant,

v.

CHICAGO TITLE AND TRUST
COMPANY, a corporation,
as Trustee under Liquidating
Trust No. 30081,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

323 I.A. 278²

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as Trustee under liquidating Trust
No. 30081, and not personally.

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Personal property used in connection with the operation of said premises, which is situated therein and owned by you at the time of delivery of deed shall thereupon be transferred to the undersigned.

The undersigned deposits herewith \$5,000. You shall have thirty-five days within which to accept this offer, and if not accepted by you within said time the deposit shall be returned to undersigned upon written request.

If this offer is accepted by you, and the undersigned does not within sixty days after such acceptance complete the cash payment and execute and deliver the instruments above required to be executed by undersigned, the deposit shall be retained by you as liquidated damages.

The sale shall be closed at your office, through escrow under Chicago Title and Trust Company's customary form of escrow agreement and undersigned shall pay the cost of such escrow, but not to exceed \$250.

This offer and any acceptance thereof by you is subject

57

1911

THEY ARE ALL THE SAME
FOLLOWING THE
AND THEY ARE ALL THE SAME
THEY ARE ALL THE SAME
THEY ARE ALL THE SAME

This action was brought by Plaintiff, John J. ...
recovered \$2,000, which she had deposited with Defendant, Chicago
Little and Trust Company, as trustee, with her written offer to
purchase said in real estate and personal property. Trial was
had by the court without a jury and finding in Defendant's favor
entered against Plaintiff, who appeals from said judgment.

Plaintiff's offer to purchase was contained in a letter,

The pertinent portions of which are as follows:

—101—

10. I will not mention it.

The undersigned hereby offers to purchase the premises owned by you, known as the "Belle Meade" in the County of Cook, State of Illinois, for the sum of \$10,000.00 in cash.

to the vessel and the time of delivery of goods shall be determined by the time of arrival of the vessel at the port of destination.

The following information was obtained from the records of the Federal Bureau of Investigation, Washington, D. C., and is being furnished to you for your information.

[illegible]

The sale shall be closed at your office, through a broker, under a title and trust company's certificate of sale, and the balance shall pay for cost of said house, but not to exceed \$250.

This offer and my acceptance thereof by you is subject

to and conditioned upon your ability to convey good title. Time is of the essence hereof.

Acceptance of this offer may be made by a notice in writing to undersigned, and no acceptance shall be binding upon you unless in writing.

JEAN MARLOWE
c/o Sabath Perlman Goodman & Rein."

Defendant replied to the offer as follows:

"Sept. 19,
1938

Jean Marlowe
c/o Sabath, Perlman, Goodman & Rein
10 S. LaSalle Street
Chicago, Illinois

Dear Madam:

The undersigned, Chicago Title & Trust Company, not personally, but as Trustee under Liquidating Trust No. 30081, does hereby accept your offer dated August 15, 1938 to purchase for \$350,000 the real estate described as follows [legal description follows.]

We call your attention to the fact that under the terms of your offer of August 15, 1938 you are obligated within sixty days from this acceptance to complete cash payment of the purchase price.

This instrument is executed by the undersigned not personally, but solely as Trustee under Liquidation Trust No. 30081, and no personal liability shall ever be asserted against the undersigned, the Bondholders' Committee, or any agent or employee of either of them, or against any certificate holder under said Liquidating Trust, all such personal liability being hereby waived.

Yours very truly,

CHICAGO TITLE & TRUST COMPANY,
as Trustee under the 20 East
Delaware Apartments Liquidation
Trust No. 30081.

By (signed) P. A. Paulson,
Assistant Trust Officer."

Defendant wrote plaintiff the following letter on November 2, 1938:

"Miss Jean Marlowe,
c/o Sabath, Perlman, Goodman & Rein
10 S. LaSalle Street
Chicago, Illinois

Attn: Mr. I. B. Perlman

Gentlemen:

to the condition upon your ability to convey said title.
This is of the essence of the matter.

Receipt of this letter may be made by a notice in
writing to the undersigned, and no receipt shall be binding upon
you unless in writing.

Very truly,
The undersigned

Deponent refers to the other as follows:

Sept. 19,
1934

John W. Harlow
c/o Sabath, Terlan, Goodman & Rein
10 S. La Salle Street
Chicago, Illinois

Dear Sirs:

The undersigned, John W. Harlow, Trust Company, not
personally, but as trustee under the will of John W. Harlow,
does hereby certify that on or about August 1, 1934, the
real estate described as follows is being
[Description follows.]

We call your attention to the fact that under the terms
of your will of August 1, 1934, you are obliged within sixty
days from this acceptance to make cash payment of the
above price.

This statement is executed by the undersigned not per-
sonally, but as trustee under the will of John W. Harlow,
and no personal liability shall ever be asserted against the
undersigned, the undersigned's committee, or any agent or attorney
of either of them, or against any co-trustee, co-tenant or
co-owner of the real estate, all with personal liability hereby
waived.

Yours very truly,

John W. Harlow, Trust Company,
as Trustee under the will of
John W. Harlow, Trust Company,
Trust No. 1001.

By (Signature) J. W. Harlow,
Assistant Trust Officer.

Deponent notes plaintiff the following letter in answer

to 1934:

Miss Jean Harlow,
c/o Sabath, Terlan, Goodman & Rein
10 S. La Salle Street
Chicago, Illinois

Attn: Mr. J. W. Terlan

Gentlemen:

In Re: 20 East Delaware Apartments
Liquidation Trust No. 30081

I enclose herewith an original report on the title of this property issued under application No. 2328480 which report indicates that the title to this property is good and sufficient in the Chicago Title and Trust Company as Trustee under the provisions of a Trust Agreement dated January 11, 1933 and known as Trust No. 30081 as of October 28, 1938, subject only to an unpaid balance on the 1935 real estate taxes and the 1938 real estate taxes that have accrued; also, subject to a Trust Deed dated December 19, 1935, given to the Continental Illinois National Bank and Trust Company of Chicago to secure a note in the principal amount of \$100,000 and a Chattel Mortgage dated January 16, 1936 executed as additional security for the foregoing Trust Deed.

The taxes are to be pro rated and the Trust Deed and Chattel Mortgage will be released when the proceeds of the sale are deposited.

The objection relating to the terms and provisions of the Trust Agreement will, of course, be waived upon a conveyance of the property.

Please acknowledge receipt of the report on the enclosed copy of this letter.

Very truly yours,

(sgnd.) W. L. Blake."

On November 19, 1938 defendant received the following written request from plaintiff: "In connection with my offer to purchase the above described premises, which offer was dated August 15, 1938, I hereby respectfully request that the time to consummate said transaction be extended to and including January 24, 1939." The requested extension was granted by defendant. Plaintiff having failed to pay the balance due on the purchase price of the property on or prior to January 24, 1939 or to take any other and further steps to consummate the purchase, defendant wrote plaintiff in care of her attorney on January 28, 1939 that it "does hereby declare a default by you under the terms and provisions" of your offer of purchase of August 15, 1938 and "does hereby notify you of its election to retain the *** \$5,000 deposited by you, in accordance with the provisions of said offer."

For a proper understanding of the transaction involved herein, it is well to note that Jean Marlowe, in whose name

In Re: 20 East Delaware Apartments
Liquidation of Trust No. 10001

I enclose herewith an original report on the title of this property issued under Liquidation No. 10001, which report indicates that the title to this property is good and unclouded in the Chicago title and trust company records under the provisions of a Trust Agreement dated January 11, 1933, and known as Trust No. 10001 as of October 2, 1933, subject only to an unpaid balance on the 1933 real estate taxes and the 1938 real estate taxes that have accrued; also, subject to a Trust Agreement dated January 11, 1933, given to the defendant Illinois National Bank and Trust Company of Chicago to secure a note in the principal amount of \$100,000 and interest thereon. Mortgage dated January 10, 1930 executed as additional security for the foregoing Trust No. 10001.

The taxes are to be paid and the Trust No. 10001 will be released from the proceeds of the sale and deposited.

The objection relating to the terms and provisions of the Trust Agreement will, of course, be solved upon a conveyance of the property.

Please see herewith report of the referee on the enclosed copy of this letter.

Very truly yours,

Wm. H. H. H. H.

On November 12, 1933 defendant received the following written request from plaintiff: "In connection with the sale to purchase the above described premises, which of course was made on August 15, 1933, I hereby respectfully request that the title to consummate said transaction be returned to me including January 24, 1933." The request was granted by defendant. Plaintiff having failed to pay the balance due on the purchase price of the property on or prior to January 24, 1933 or to take any other and further steps to consummate the purchase, defendant wrote plaintiff in care of her attorney on January 28, 1933 that it "does hereby require a conveyance of under the terms and provisions" of your offer of purchase of August 15, 1933 and "does hereby notify you of its election to retain the *** \$1,000 deposited by you, in accordance with the provisions of said offer."

For a proper understanding of the transaction involved herein, it is well to note that when the above, in these names

the offer to purchase the property in question was made and who is the nominal plaintiff in this case, is the secretary of one John J. Mack and that she made such offer in his behalf; that Mack is in the hotel business and has operated hotels since 1931; that prior to this transaction he had purchased and sold approximately one hundred pieces of Chicago real estate; that Attorney Israel B. Perlman of the law firm of Sabath, Perlman, Goodman & Rein represented Mack throughout the negotiations for the purchase of the property; and that the written offer to purchase was prepared under the direction of Attorney Perlman. Attorney Perlman testified that before the written offer was submitted to defendant he "endeavored to negotiate the purchase of this real estate;" and that he "discussed this matter with various officers of the Chicago Title & Trust Company, trustee, *** who held title to the property for the benefit of the bondholders or stockholders *** the terms were all discussed, all the salient terms," including the amount of the purchase price and the deposit.

Plaintiff first contends that defendant's letter of September 19, 1938 was not a valid acceptance because it did not conform exactly to her offer in that said letter stated in the last paragraph thereof that "this instrument is executed by the undersigned, not personally, but solely as Trustee under Liquidation Trust No. 30081, and no personal liability shall ever be asserted against the undersigned, the Bondholders' Committee, or any agent or employe of either of them, or against any certificate holder under said Liquidating Trust, all such personal liability being hereby waived."

It must be conceded that defendant's statement in its reply to the offer that "Chicago Title & Trust Company, not personally, but as Trustee under Liquidating Trust No. 30081, does hereby accept your offer dated August 15, 1938 to purchase for \$350,000 the real estate" involved herein constituted an unequivocal acceptance of such offer. But plaintiff asserts that

the offer to purchase the property in question was made and who
is the original grantor in this case, is the necessity of one
John J. Cook and that the same was made in his behalf; that
there is in the local business and the operation of the same since 1931;
that prior to this transaction he had no other and sold property
entirely one hundred acres of Chicago real estate; that thereby
James J. Cookman of the law firm of Cookman, Cookman &
Cookman represented him throughout the negotiations for the purchase
of the property; and that the written offer to purchase was made
under the direction of Attorney Cookman. Attorney Cookman
testified that before the written offer was submitted to defendant
he "endeavored to negotiate the purchase of this real estate;" and
that he "discussed this matter with various officers of the Chicago
title insurance company, Cookman, Cookman & Cookman, and with title to the property
for the benefit of the beneficiaries of the Cookman Cookman Trust
and all interested parties, including the company
of the Cookman Trust and the Cookman Trust."
The first sentence of the Cookman Trust's letter of
September 12, 1931, was a letter to the Cookman Trust and it was not
concerned with the offer to purchase the property stated in the
last paragraph of the letter. This statement is recited by the
Cookman Trust, not personally, but solely as trustee under the
Cookman Trust No. 3001, and no personal liability shall ever
be asserted against the undersigned, the Cookman Trust, Cookman, Cookman &
Cookman or any agent or officer of either of them, or against any
certificates holder under said Cookman Trust, all such personal
liability being hereby waived.
It was be conceded that the Cookman Trust's statement in its
reply to the offer that Chicago title insurance company, not per-
sonally, but as trustee under Cookman Trust No. 3001, was
thereby except your offer dated August 12, 1931 to purchase for
\$30,000 the real estate involved herein constituted an un-
equivocal acceptance of such offer. But plaintiff asserts that

the exclusion in the last paragraph of said reply of personal liability on the purchase contract on the part of the Chicago Title and Trust Company, "the Bondholders' Committee, or any agent or employe of either of them" or "any certificate holder under said Liquidating Trust" imposes a condition not contained in the offer and that therefore defendant's reply must be construed as a counter offer rather than a valid and binding acceptance. This assertion is made in spite of the fact that Mack, an experienced real estate operator, and Attorney Perlman, an able and experienced lawyer, interpreted and treated defendant's reply to the offer as an unequivocal and unconditional acceptance from the very day it was received. They continued to so treat it for sixty-one days thereafter, when on November 19, 1938 they requested in writing an extension of time until January 24, 1939, within which "to consummate said transaction." Thus it conclusively appears that they recognized that the offer and acceptance constituted a valid contract for the purchase of the property. Neither before nor after Mack defaulted on the contract of purchase did he or his attorney question its validity because of the exclusion from personal liability of the parties heretofore referred to or for any other reason. When Mack's attorney addressed the offer to "Chicago Title and Trust Company, as Trustee under Liquidating Trust No. 30081, and not personally," he necessarily contemplated that such offer would be accepted by defendant as trustee and not personally. Defendant's acceptance of the offer was in conformity with the terms of the Trust Agreement, which created the trust of which it was trustee. It is fair and reasonable to assume that Attorney Perlman, negotiating this \$350,000 deal for Mack, examined the Trust Agreement which prescribed defendant's powers, duties and obligations in connection with the trust property and that he was familiar with its terms. The Trust Agreement specified that every contract or agreement "entered into in writing by the Trustee shall provide

The inclusion in the last paragraph of this report of a statement of the fact that the Trust is not a party to the contract, is a statement of the fact that the Trust is not a party to the contract, and is a statement of the fact that the Trust is not a party to the contract.

expressly against the personal liability of the Trustee, the Certificate Holders and the Bondholders' Committee, or any member thereof." Thus defendant was obligated under the terms of the Trust Agreement to incorporate the personal nonliability provision in its acceptance and, as has been seen, no objection was interposed to such provision until the complaint herein was filed. In our opinion plaintiff's instant contention that said nonliability provision varied the terms of the offer is merely an afterthought. Furthermore this provision did not vary the conditions of the offer because none of the persons thereby exempted from personal liability could have been held liable in any event, since said offer was addressed to defendant as trustee and "not personally," and it was so accepted.

Plaintiff next contends that "the defect in defendant's letter of opinion is contrary to the terms of the offer." There is not the slightest merit in this contention. Included in the proposal for the purchase of the property was the provision that "this offer and any acceptance thereof by you is subject to and conditioned upon your ability to convey good title." After the offer had been accepted, defendant furnished plaintiff with a "customary report of the Chicago Title and Trust Company on application for Owner's Guarantee Policy" as provided in said offer. This report showed title in defendant as trustee subject to the following objections: "Taxes for the year 1935 -- Trust Deed dated December 19, 1935, to secure note for \$100,000 -- Chattel Mortgage dated January 16, 1936 -- Provisions of Trust Agreement No. 30081." Defendant's letter to plaintiff heretofore set forth, which accompanied said report, stated:

"The taxes are to be prorated and the trust deed and chattel mortgage will be released when the proceeds of the sale are deposited.

The objection relating to the terms and provisions of the trust agreement will, of course, be waived upon a conveyance of the property."

The defects in defendant's title of which plaintiff now

expressly against the personal liability of the trustee, the

trustees, holders and the beneficiaries, or any
other person. This document was executed under the terms
of the trust agreement to incorporate the personal responsibility
provision in its entirety, and, as has been seen, no objection
was interposed to such provision until the complaint herein was
filed. In my opinion, the plaintiff's contention that said
provision is void as against public policy is merely
an afterthought. Furthermore, this provision did not vary the
conditions of the offer because none of the persons thereby
excepted from personal liability were ever liable in
any event, since said offer was intended to operate as a release
and "not personalty," and it was so intended.

Plaintiff now contends that "the intent in defendant's
letter of opinion is contrary to the terms of the offer." There
is not the slightest basis in this contention. Included in the
proposal for the release of the property was the provision that
this offer and any acceptance thereof by you is subject to and
conditioned upon your ability to secure good title. After the
offer had been accepted, defendant furnished plaintiff with a
"custodian's report of the title and trust company on
application for said release policy" as provided in said
offer. This report showed title in defendant as trustee subject
to the following objections: "James for the year 1911 - Grant
 deed dated December 15, 1911, to secure note for \$10,000 -
 Charles Mortgage dated January 15, 1912 - Provisions of Trust
 Agreement No. 2001." Defendant's letter to plaintiff dated
 June 1st last, which accompanied said report, stated:

"The taxes are to be paid and the trust deed and
 Charles Mortgage will be released when the proceeds of the sale
 are deposited."

The objection relating to the terms and provisions of
 the trust agreement will, of course, be waived upon a convey-
 ance of the property.

The defects in defendant's title of which plaintiff now

complains are the liens as above set forth. Such liens were presently payable in an aggregate amount substantially less than the purchase price of the property. The only reasonable construction of the provisions in the contract of purchase concerning the title to the property is that the report on title must show that defendant had a good and merchantable title, which would be freed of any liens shown in said report simultaneously with the payment of the purchase price. This construction is consistent with the ordinary method of closing real estate deals and it is also consistent with the further contract provision that the sale was to be consummated through an escrow at the buyer's expense. In Seerup v. Goraczowski, 199 N. W. 94 (Minn.) it was said at p. 95: "It is the law of this state, when the contract is to furnish an abstract showing merchantable title and to convey by warranty deed, that mortgages resting upon the vendor's title may be paid out of the cash payment to be made when the contract is closed and that it is not necessary that the vendor pay them before the time to close comes and record satisfactions so that the abstract will show title free of incumbrances." Moreover, plaintiff requested and was granted the extension of time within which to pay the balance due on her contract of purchase after she had received the aforesaid report on title and was presumably fully acquainted with defendant's title as shown therein. She received the report on title on or about November 2, 1938. She requested the extension on November 19, 1938 and same was granted on November 29, 1938. She defaulted on her contract of purchase on January 24, 1939. Never at any time after she received said report on title was there any complaint made as to any substantial defect appearing therein. Nor at the time of her default was any attempt made to justify her failure to perform her contract because of defects appearing in the report on title. This being so, she is precluded from raising that question now.

[illegible]

It is urged that "the provision in plaintiff's offer for the retention of \$5,000 must be construed to be a penalty for nonperformance and not liquidated damages." There is no merit in this contention and it is unnecessary to discuss the question as to when damages stipulated in a contract should be construed as a penalty, since plaintiff's deposit of \$5,000 must be considered as a guaranty of her performance of her contract of purchase. When the \$5,000 was originally deposited, it merely evidenced the good faith of plaintiff in making the offer. The offer and the acceptance thereof constituted a binding contract between the parties and under its terms the \$5,000 deposit then became a part payment or earnest money to be applied on the purchase price upon the consummation of the sale. It has always been the law of this state that earnest money deposited as part payment of the purchase price of property under a contract of purchase cannot be recovered back on a forfeiture of the contract through the fault of the vendee. This is of course true when the contract specifically provides, as does the contract in this case, that "the deposit shall be retained" by the vendor "as liquidated damages." This rule also applies even though the contract of purchase does not specifically provide that a deposit of earnest money may be retained by the vendor upon the default of the vendee. (Harlow v. Snow, 147 Ill. App. 369.) In Summers v. Hedenberg, 198 Ill. App. 460, it was held at p. 466:

"It makes no difference whether the earnest money was delivered to the seller or by agreement is held by a third party. In case of defects in title which are not cured, at purchaser's option the contract becomes void and said earnest money should be returned. If the purchaser fails to perform, then at seller's option the earnest money should be retained by the vendor as liquidated damages."

In Bucklen v. Hasterlik, 155 Ill. 423, the court said at pp. 429 and 430:

"By the terms of this contract the earnest money became the property of appellee, of which he could be divested only in the event of his failure to perform his contract. The check

It is noted that the provision in Plaintiff's offer for the retention of \$5,000 must be construed to be a penalty for nonperformance and not liquidated damages. There is no merit in this contention and it is unnecessary to discuss the question as to when damages are recoverable in a contract which is considered as a penalty, since Plaintiff's offer of \$5,000 must be considered as a guarantee of the performance of the contract of purchase. When the \$5,000 was originally deposited, it was fully evidenced the good faith of Plaintiff in making the offer. The offer and the deposit of money constituted a binding contract between the parties and under the terms the \$5,000 deposit then became a part of the purchase money to be applied on the purchase price and the completion of the sale. It was clearly the intention of the parties that the money deposited as part payment of the purchase price of property under a contract of purchase should be retained with on a forfeiture of the contract should the buyer fail to perform. This is of course true when the contract is specifically made, as does the contract in this case, that the deposit shall be retained by the vendor "as liquidated damages". This rule also applies even when the contract is general in nature and the deposit is made as a deposit of earnest money to be retained by the vendor upon the failure of the buyer. (See W. H. Jones, 147 Ill. App. 100.) In W. H. Jones v. W. H. Jones, 147 Ill. App. 100, it was held at p. 101:

"It seems no difference whether the earnest money was delivered to the seller or an agent thereof in this case. In view of the fact that the contract was not made, as Plaintiff's action the contract between the parties is void, the money should be returned. If the contract fails to perform, then at Plaintiff's option the earnest money should be retained by the vendor as liquidated damages."

In W. H. Jones v. W. H. Jones, 147 Ill. App. 100, the court said at pp. 102 and 103:

"By the terms of this contract the earnest money became the property of Plaintiff, it being so stated in the contract. In the event of Plaintiff's failure to perform the contract, the money

was, at the time it was drawn, delivered to appellee, and while it is true it was afterward deposited, together with the contract, with the International Bank, the evident purpose thereof was to guarantee that Hasterlik would, within the time prescribed, furnish evidence of a good title, in which event he would be entitled to the check or the money, Fry on Specific Performance (3d ed.1460), says: 'Where the purchaser, after making the payment by way of deposit, unjustifiably repudiates the contract, or in any other way goes off through his default, the vendor is, in the absence of stipulation on the point, entitled to retain the money, treating it as having been paid to him as a guaranty for the purchaser's performance of the contract.' In Depree v. Bedborough, 4 Giff. 479, it was said in the opinion: 'Then how the person who was in default can, upon that default and in consequence of that default, acquire any right to the money, which was parted with as a security that there should be no default, it is difficult to conceive.'"

For the reasons stated herein the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

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323 I.A. 279

323 I.A. 279

323 I.A. 279

ILLINOIS CASUALTY CO., a
corporation,

Plaintiff,

v.

DOUGLAS COOK, doing business
as Central Funeral Home,
Appellee.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

Plaintiff, Illinois Casualty Co., is engaged in the business of manufacturing and selling policies and funeral insurance. Defendant, Douglas Cook, is an independent agent for plaintiff as Central Funeral Home. Plaintiff claims that defendant owes it a balance of \$471.17 for money paid and delivered to him. Defendant admits that he owes said balance but contends that he is entitled to an account credit of \$604.30, which is the amount of the account that was due him on the oral contract of one year made to pay the funeral bill of her sister, according to said account was purchased outright from him and transferred to plaintiff by his written assignment. Plaintiff's defense is the contention that the assignment of the account accorded to it was made with the express agreement between the parties that if and when any collections were made thereon, the net proceeds thereof would be credited to defendant's account with plaintiff and if the net account could not be collected it would be returned; that plaintiff was unable to collect the net account or any part of it; that therefore defendant was not entitled to and has not been allowed any credit by plaintiff in consequence of the assignment to it of the net account; and that plaintiff has offered and tendered the return of such account. The case was tried by the court without a jury. The issues were found against defendant on his counterclaim and judgment was entered on such findings. The issues were found against plaintiff on its statement of claim and judgment was

entered on such finding. It is from this latter judgment that plaintiff appeals.

In explanation of the judgments it should be stated that the trial court actually found the issues in favor of defendant on his counterclaim but because the evidence disclosed that he claimed \$604.30 credit rather than cash from plaintiff by reason of the assignment of the Martin account, \$471.05 of such credit was offset against the balance of \$471.05 admittedly due plaintiff and judgment was not rendered in favor of defendant for the amount his counterclaim exceeded plaintiff's claim, because such excess was merely claimed credit.

The sole question in this case is whether Cohn's written assignment of the Martin account to the Illinois Casket Co., which is absolute on its face, constituted an outright purchase of the Martin account by plaintiff or whether said account was turned over and later assigned to plaintiff merely for the purpose of collecting same, if possible, for defendant's benefit and credit.

Defendant insists that if it is held otherwise than that the assignment constituted an outright sale by defendant to plaintiff of Anna Martin's oral contract to pay the funeral bill of her sister, it would be to make a new contract for the parties by improperly permitting the terms of the written assignment to be added to or varied by parol evidence. The assignment recites that it was made in consideration of one dollar and "other good and valuable consideration." While the acknowledgment of the payment of a stated consideration in a written instrument cannot be contradicted by parol evidence for the purpose of invalidating such instrument, parol evidence is competent to show the true consideration. (Gillespie v. Fulton Oil and Gas Co., 236 Ill. 188; Riley v. International Banana Food Co., 185 Ill. App. 629.) As a general rule the recitals of a written instrument as to the consideration are

not conclusive, and it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was. (22 C. J. p. 1157, sec. 1555; Deutser v. Marlboro Shirt Co., 81 Fed. (2d) 139.) The rule permitting the true consideration to be shown by parol or extrinsic evidence is applicable to assignments. (32 C. J. S., p. 881, sec. 952.) The trial court properly admitted competent parol and other extrinsic evidence to show the real consideration for defendant's assignment.

Plaintiff contends that the finding and judgment of the trial court on its statement of claim were manifestly against the weight of the evidence.

George P. Sullivan was vice president and sales manager of the Illinois Casket Co. and had been connected with that company for 25 years. Defendant had transacted all of his business with plaintiff company over a number of years with Sullivan. Cohn owed plaintiff a balance of \$200 on May 16, 1939, when he made the written assignment of the Martin account to it. At that time said account was over nine years old. Cohn had tried to collect this account himself ever since May 9, 1930. At the time of its assignment the claim against Anna Martin was in all likelihood subject to the defense of the statute of limitations. It is not only highly improbable but unbelievable that any sane business man would purchase outright this stale nine year old claim and agree to allow defendant full credit for the face amount thereof.

It is admitted that Cohn turned over and assigned a number of his other funeral bill accounts to plaintiff so that the latter might aid in the collection thereof because of its better collection facilities and that he even submitted a form of letter that he desired plaintiff to send to his delinquent debtors. Plaintiff's records show that in all instances where collections were made on such accounts Cohn was given credit

not conclusive, and it is always necessary to inquire into the consideration and show by direct or circumstantial evidence that the first consideration was. (22 U. S. 117, sec. 155; Robert V. Anderson, 170 U. S. 155, 156.) The rule permitting the jury to consider the evidence as to the fact or existence of a consideration is applicable to the case. (22 U. S. 117, sec. 155, 156.) The trial court properly refused to permit the jury to consider the evidence as to the fact or existence of a consideration for defendant's benefit.

The court contains that the finding and judgment of the trial court on its statement of facts was manifestly against the weight of the evidence.

George F. Sullivan was vice president of the Illinois Central Co., and had been connected with that company for 25 years. Defendant had withdrawn all of his business with plaintiff company over a number of years with Sullivan. John owed plaintiff a balance of \$100 on May 15, 1939, when he made the written assignment of the credit account to it. At that time said account was over nine years old, and had tried to collect this account himself ever since May 15, 1939. At the time of its assignment the claim against the defendant was in all likelihood subject to the defense of the statute of limitations. It is not only clearly impossible but unbelievable that any sane business man would purchase credit this state nine years old claim and agree to allow defendant full credit for the face amount thereof.

It is admitted that John turned over and assigned a number of his other personal bills accounts to plaintiff so that the latter might aid in the collection thereof because of its better collection facilities and that he even suggested a form of letter that he desired plaintiff to send to his delinquent debtors. Plaintiff's records show that in all instances where collections were made on such accounts John was given credit

for them and that where it was necessary to bring suit to compel payment he was charged with the expenses and costs in connection with such suits.

It is also admitted that ever since the assignment was made and right up to the time the complaint was filed herein plaintiff sent monthly statements to defendant showing the balance due on his account and requesting the payment thereof and that in not a single one of such statements was any mention made of the \$604.30 credit which Cohn now claims by reason of his assignment of the Martin account. It is true that he testified that upon the receipt of each of these monthly statements he went to plaintiff's office and protested to Sullivan because the Martin account credit did not appear thereon. He also testified that on the occasion of each of his protests Sullivan mollified him by stating that he had given him credit for the Martin account in a second or secret set of books, to which plaintiff's bookkeepers did not have access when they sent out the monthly statements. Although Cohn's testimony in this regard is so fanciful that it is incredible, yet we find his attorney in his brief attempting to support it by quoting from Sullivan's testimony as follows: "Q. Do you keep two sets of books in your firm? A. Yes." To isolate this question and answer and then assert positively that this was Sullivan's testimony as to plaintiff's method of bookkeeping is, to say the least, an absolutely unfair reference to his testimony. It appears from the record that Sullivan is somewhat deaf and in his answers to questions which immediately followed the foregoing question and answer he testified, "We keep one double entry set of books *** we keep one complete set of books, double entry system."

On November 2, 1940 plaintiff wrote defendant the following letter:

for them and that there is no necessity to order any to be paid. Payment is not charged with the expenses and costs in connection with such suits.

It is also noted that even after the assignment was made and right up to the time the complaint was filed certain parties sent monthly statements to defendant showing the balance due on the account and requesting the payment thereof and that in not a single one of such statements was the mention made of the \$100.00 credit which had been given by reason of the assignment of the Martin account. It is also noted that when the receipt of each of these monthly statements he went to Sullivan's office and protested to Sullivan because the Martin account credit had not been entered. He also testified that on the occasion of each of the protests Sullivan advised him by stating that he had given him credit for the Martin account in a second or second set of books, to which Sullivan's bookskeepers did not have access when they came out the monthly statements. Although Sullivan's testimony in this regard is to the effect that it is inadmissible, yet as this is a matter in his belief attempted to support it by stating that Sullivan's bookskeepers as follows: "If you keep two sets of books in your office, A. Yes." To isolate this question and answer in their answers positively that this was Sullivan's testimony as to what method of bookkeeping he, to say the least, in absolutely no reference to his testimony. It appears from the record that Sullivan is somewhat deaf and in his answers to questions asked immediately followed the foregoing question and answer in such a way that he kept one double entry set of books and he kept one complete set of books, double entry system."

On November 2, 1940, Plaintiff wrote defendant the following letter:

"Central Funeral Home
2153 W. Van Buren St.
Chicago, Illinois

Re: Anna W. Martin

Gentlemen:

We are enclosing local attorney's report on the above assignment.

Will you kindly read this over and let us have your further instructions.

Very truly yours,

Illinois Casket Co.
By: G. P. Sullivan."

Sullivan testified that defendant mailed this letter back to plaintiff with his answer underneath same in his own handwriting as follows:

"I advise you Ill. Casket Co. to go ahead and if any moneys are forthcoming apply to my account.

Adolph Cohn."

Cohn testified that he did not mail plaintiff's letter back to it but that he took the letter to Sullivan to whom he said, "About the attorney's reports, what have I got to do with this?" He further testified in respect to his answer to plaintiff's letter that Sullivan told him, "Write down Illinois Casket Company to give you credit for this account" and that "he wrote that in his office, on his desk under his advisement." It is argued in effect in defendant's brief that Sullivan, being "an old fox," took advantage of Cohn, who is "not an educated man" and "uses very poor English," that Sullivan imposed upon Cohn by having him write just what Sullivan dictated to him and that Cohn was so unfamiliar with business affairs that he would have written anything that Sullivan told him to write. That Cohn was shrewd and fairly intelligent and conversant with business affairs is clearly shown by his testimony in connection with his execution of his assignment, wherein he stated that "he [Sullivan] had the paper and I signed the assignment, and I read it over thoroughly before. There were no strings tied to it." That Cohn was alert in his dealings

Central Mutual Bank
2153 N. Main Street
Chicago, Illinois

Re: Anna M. Sullivan

Enclosure:

The enclosed local attorney's report on the above assignment.
I will you kindly read this over and let us have your
further instructions.

Very truly yours,

William Sullivan
2153 N. Main Street
Chicago, Illinois

Sullivan testified that he had not called this letter back
to plaintiff with his answer regarding same in his own hand-

writing as follows:

"I advise you Mr. [Name], that I have not called this letter back
to plaintiff with my answer regarding same in my own hand-
writing as follows:

John testified that he did not call this letter back

back to it but that he took the letter to Sullivan as soon as

said, "about the attorney's report, what have I got to do with

this?" He testified that in answer to this answer to John

John's letter to Sullivan, John said, "Write down Illinois

United Company to give you credit for this account and that

he wrote that in his office, on the day when his answer was

it is agreed in effect in testimony that John said, "Write

an old fool," "You are a fool," "You are a fool," "You are a fool,"

and "a very poor fellow," "You are a fool," "You are a fool,"

John by having the wife that Sullivan testified to him

and that John was so much like with business affairs that he

would have written anything that Sullivan told him to write.

That John was smart and fairly intelligent and conversant

with business affairs is clearly shown by his testimony in

connection with his execution of his assignment, wherein he

stated that "the [Sullivan] and the [Name] and I signed the

assignment, and I read it over thoroughly before. There were

no springs tied to it." That John was smart in his business

with Sullivan and quite well versed in the English language is demonstrated by the letter heretofore referred to, which he wrote in his own handwriting as a form for Sullivan to follow in writing letters to defendant's delinquent debtors on plaintiff's stationery. As explained to Sullivan, it was Cohn's intention and purpose in formulating the letter to use language that would not be offensive. This letter, the form of which was followed by plaintiff in writing to all of Cohn's delinquent debtors, including Anna Martin, whose accounts were turned over and assigned to it, is as follows:

"Mr. Horwitz

Will you please make arrangements and send balance \$125.00 due Central Funeral Home (Mr. Adolph Cohn) since April 23rd 1932 so we can credit Mr. Cohn with same. I would greatly appreciate your cooperation in this matter as we would not like to add extra expense to this long past due account.

Respectfully,

Ill. Casket Co.

per _____

April 23rd 1932
Bal 135.00 cash
June 10/37"

In our opinion, when plaintiff wrote defendant on November 2, 1940, more than 17 months after the assignment was made, requesting "your further instructions" as to the Martin account and defendant answered advising plaintiff "to go ahead and if any moneys are forthcoming apply to my account," this answer of Cohn's is sufficient in itself to preclude him from claiming any credit for the uncollected and uncollectible Martin account.

Subsequent to the assignment defendant made two cash payments to plaintiff on his own account - \$20 and \$100. He testified that he made the \$20 payment to one of plaintiff's salesmen for a cash purchase. As to the \$100 payment he testified variously that he made same because he "had been drinking the day before," that he would not have made it if he had his

with Sullivan and with well versed in the English language
is demonstrated by the fact that the letters referred to, which
he wrote in his own handwriting as a form for Sullivan to
follow in writing letters to defendant's delinquent debtors
on plaintiff's stationery, was explained to Sullivan, it was
John's intention and purpose in forwarding the letter to use
language that would not be offensive. This letter, the form
of which was followed by plaintiff in writing to all of John's
delinquent debtors, including some writing, which was
turned over and signed to it, is as follows:

"Mr. Sir,

All you please make payment and send balance
to the Central Bank, 1000 1st St., Chicago, Ill.
I am writing you on 10/10/33 so you can see the date.
I would greatly appreciate your cooperation in this matter
as we would not like to see your name on this list
and account.

Sincerely,

W. J. Sullivan

10/10/33

W. J. Sullivan
1000 1st St.
Chicago, Ill.

In an opinion, John Sullivan wrote defendant on November
2, 1940, more than 17 months after the assignment was made, re-
questing "your further instructions" as to the matter account
and defendant answered advising plaintiff to go ahead and if
any moneys are forthcoming apply to my account," this answer
of course is sufficient in itself to preclude him from claiming
any credit for the uncollected and uncollectible matter account.
Subsequent to the assignment defendant made two cash pay-
ments to plaintiff on his own account - \$50 and \$100. In testi-
fied that he made the \$50 payment to one of plaintiff's salesmen
for a cash purchase. As to the \$100 payment he testified
variously that he had seen it in his hand during the
day before," that he would not have made it if he had his

"right head" and that he wanted "to keep my account up to \$600 and wanted to keep my credit up *** I did a lot of business with these people and I wanted to have a standing credit." If defendant had a credit balance in his favor, as he claims, because of plaintiff's outright purchase of the Martin account, it was entirely unnecessary and inconsistent for him to make any cash payments on his own account. The reasons he advances for making such payments are neither convincing nor probable.

We think that the evidence shows conclusively that the real consideration for the assignment was plaintiff's offer and agreement to collect the Martin account, if possible, for defendant's benefit and credit, and we are impelled to hold that the finding and judgment of the trial court in favor of defendant on plaintiff's statement of claim are against the manifest weight of the evidence. Since there is no merit in defendant's counterclaim and he admittedly owes plaintiff a balance of \$471.05, it would serve no useful purpose to remand this cause.

While it is true that where the testimony is conflicting the findings of the trial court on questions of fact will not ordinarily be disturbed on appeal, it is also true that it is the duty of a reviewing court to reverse a judgment which is based on findings of fact, where, as here, they are clearly against the manifest weight of the evidence.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed and judgment is entered here for \$471.05 in favor of plaintiff and against defendant on plaintiff's statement of claim.

REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

"right head" and that he wanted to keep up working up to \$500 and wanted to keep up at \$100 up to I did a lot of business with these people and I wanted to have a working credit. It happened that I credit balance in his favor, as he claims, because of defendant's outright purchase of the main account, it was certainly, undoubtedly and therefore for him to make any such payment on his own account. The reasons he advances for making such payment are manifestly convincing and probable.

To think that the evidence was so manifestly convincing as to lead to a judgment for the defendant was plain and obvious and therefore to collect the main account, if possible, for defendant's benefit and credit, and the balance to him of that the finding and judgment of the trial court in favor of defendant on plaintiff's statement of claim was against the manifest weight of the evidence. There was in no way in defendant's favor and he accordingly was entitled to a balance of \$471.02, it would have been a matter of course to return this cause.

While it is true that there the testimony is conflicting the findings of the trial court on questions of fact will not ordinarily be disturbed on appeal, it is also true that it is the duty of a reviewing court to reverse a judgment which is based on findings of fact, where, as here, they are clearly against the manifest weight of the evidence.

For the reasons stated herein the judgment of the United States Court of Appeals is reversed and judgment is entered here for \$471.02 in favor of plaintiff and against defendant on plaintiff's statement of claim.

REVEREND AND HONORABLE

Friend, P. J., and Seelman, J., concur.

42863

BESSIE SIMON,
Appellant,

v.

PAUL BALASIC and ALFRED
BALASIC,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

ON REHEARING.

323 I.A. 230

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Bessie Simon, for the alleged conversion by defendants Paula Balasic and Alfred Balasic, of certain personal property, consisting of household furniture and furnishings, belonging to plaintiff. Upon a trial by the court without a jury defendants were found not guilty and judgment was entered in their favor. Plaintiff appeals from such judgment.

The statement of claim alleged that on March 29, 1940 defendants were "in possession of plaintiff's goods;" that on said date plaintiff made a written demand upon defendants for said goods; that her demand was refused; that defendants converted her property to their own use; and that the reasonable value of said property was \$500. Included in the statement of claim was a list of the household furniture, furnishings and other personal property claimed to have been converted.

Defendants' statement of defense denied plaintiff's ownership of the goods claimed, denied that such goods were ever left in their possession, and also denied that they were guilty of converting any of plaintiff's personal property.

It appeared that on February 27, 1940 defendants purchased from plaintiff for \$2,100 cash ~~all~~ all of the furniture and furnishings in the forty-seven room building at 55 West Erie street, Chicago, which building had been theretofore operated by Bessie Simon as the Calumet Hotel, as well as her leasehold interest and the good will of her hotel business. It also appeared that

STATE OF ILLINOIS
COURT OF COMMON PLEAS

BESSIE SIMON, Plaintiff,
v.
PAUL BALASIC and ALICE BALASIC, Defendants.

NO. 1234567890

This action was brought by plaintiff, Bessie Simon, for the alleged conversion by defendants Paul Balasic and Alfred Balasic, of certain personal property, consisting of household furnishings and furnishings, belonging to plaintiff. Upon a trial by the court without a jury, defendants were found not guilty and judgment was entered in their favor. Plaintiff appeals from such judgment.

The statement of claim alleged that on March 27, 1940

defendants were "in possession of plaintiff's goods;" that on said date plaintiff made a written demand upon defendants for said goods; that her demand was refused; that defendants converted her property to their own use; and that the reasonable value of said property was \$200. Included in the statement of claim was a list of the household furnishings, furnishings and other personal property claimed to have been converted.

Defendants' statement of defense denied plaintiff's ownership of the goods claimed, denied that such goods were ever left in their possession, and also denied that they were guilty of converting any of plaintiff's personal property.

It appeared that on February 27, 1940 defendants purchased from plaintiff for \$2,100 cash all of the fixtures and furnishings in the forty-seven room building at 25 West Erie Street, Chicago, which building had been theretofore operated by Bessie Simon as the Calumet Hotel, as well as her leasehold interest and the good will of her hotel business. It also appeared that

within a few days after defendants took possession of the hotel premises plaintiff removed her personal possessions from that portion of the hotel formerly occupied by her and that Ben Goldberg, who had managed the hotel for plaintiff, had removed certain household furniture belonging to one Fred Goldberg from a basement storeroom on March 1, 1940.

Ben Goldberg testified that on or about March 2, 1940 he went to the hotel premises with a truck and that he "told Mr. Balasic that we came to take out the household goods Mrs. Simon has in the storerooms of the basement, so I started to go down to the basement to get that stuff and Mr. Balasic stopped me and said, 'I won't let you take out any more stuff *** there is nothing down there that belongs to Mrs. Simon;'" that on March 29, 1940, as plaintiff's agent, he served a written demand upon defendants for the delivery of Mrs. Simon's property as listed in such demand; that he told the defendant, Alfred Balasic, at that time that he "came to get that stuff of Mrs. Simon's that was down stairs in the storerooms" and that Balasic said "over thirty days have passed and you are not entitled to it."

Both Bessie Simon and Ben Goldberg testified in substance that in June, 1940, when this case first appeared on the call in the Municipal court, all the parties and their attorneys met in the corridor outside the courtroom; that Ben Goldberg was present at said meeting; that at that time defendants and their attorney went over the itemized list of household articles included in plaintiff's statement of claim and in the written demand and checked off on said list the items that were still in the hotel and those which were not; that defendants and their attorney then admitted that all the articles listed, with a few exceptions, were still at the hotel and told plaintiff that she might remove same; that plaintiff agreed that she would be satisfied to take her household belongings indicated on the list by defendants as

within a few days after defendants took possession of the hotel premises plaintiff removed her personal possessions from that portion of the hotel formerly occupied by her and that her Gold-berg, who had rented the hotel for plaintiff, had removed certain household furniture belonging to one Fred Goldberg from a basement storeroom on March 1, 1940.

Ben Goldberg testified that on or about March 2, 1940 he went to the hotel premises with a truck and that he "told Mr. Gold-berg that we came to take out the household goods Mrs. Gold-berg has in the storeroom of the basement, so I started to go down to the basement to get that stuff and Mr. Gold-berg stopped me and said, 'I won't let you take out any more stuff' and there is nothing down there that belongs to Mr. Gold-berg" and on March 29, 1940, as plaintiff's agent, he received a written demand upon defendants for the delivery of Mrs. Gold-berg's property as listed in such demand; that he told the defendants, "I told Gold-berg, at that time that he 'came to get that stuff' and Mr. Gold-berg's that was down stairs in the storeroom" and that Gold-berg said "over thirty days have passed and you are not entitled to it."

Both Gold-berg and Ben Goldberg testified in substance that in June, 1940, when this case first appeared on the call in the Municipal Court, all the parties and their attorneys met in the corridor outside the courtroom; that Ben Gold-berg was present at said meeting; that at that time defendants and their attorney went over the itemized list of household articles included in plaintiff's statement of claim and in the written demand and checked off on said list the items that were still in the hotel and those which were not; that defendants and their attorney then asserted that all the articles listed, with a few exceptions, were still at the hotel and told plaintiff that she might remove same; that plaintiff agreed that she would be entitled to take her household belongings indicated on the list by defendants as

being still at the hotel; that on the same afternoon plaintiff and Ben Goldberg went to the hotel with an expressman and a truck to remove her belongings; that defendant Alfred Balasic, accompanied them to the basement and, pointing to a pile of "rubbish" in the center of the basement floor, said, "There it is;" that plaintiff protested that that was not her "stuff" and that her property was in the four storerooms and in the three-room basement apartment; and that Balasic insisted that the "stuff" on the basement floor was the only property in the hotel that belonged to plaintiff and would not permit them to enter the storerooms. Plaintiff and Ben Goldberg both testified that the reasonable value of the property in question was at least \$425.

Defendant Alfred Balasic testified that plaintiff's written demand for the delivery to her of the personal property involved herein was served upon him March 29, 1940; and that at the meeting of the parties and their attorneys in June 1940, after this suit had been filed, he admitted that nearly all the articles of household furniture belonging to plaintiff were still in the hotel and that he stated at that time that he would turn such articles over to her, if she called for them. He then denied in his testimony that plaintiff or anybody in her behalf came to the hotel to remove her property after his agreement in June 1940 that she might remove same or that at or about the time he was served with the written demand or at any other time plaintiff or anyone in her behalf came to the hotel with an expressman and a truck, requesting permission to remove her property. According to Balasic's testimony, plaintiff's property, which he admitted was in the hotel, is still there but, although he did not say so directly, he attempted to leave the inference that it was nothing but "junk."

According to plaintiff, the household furniture and furnishings, which she claims defendants refused to turn over to

being still at the hotel; but on the same afternoon plaintiff and Ben Goldberg went to the hotel with an expressman and a truck to remove her belongings; that defendant lifted plaintiff accompanied them to the basement and, pointing to a pile of "trunk" in the corner of the basement floor, said, "Where it is;" that plaintiff protested that it was not her "stuff" and that her property was in the four storerooms and in the three-room basement apartment; and that plaintiff insisted that the "stuff" on the basement floor was her own property in the hotel that belonged to plaintiff and would not permit them to enter the storerooms. Plaintiff and Ben Goldberg both testified that the reasonable value of the property in question was at least \$425.

Defendant lifted plaintiff's written demand for the delivery to her of the personal property involved herein was served upon her on June 22, 1940; and that at the meeting of the parties and their attorneys in June 1940, after this suit had been filed, he admitted that nearly all the articles of household furniture belonging to plaintiff were still in the hotel and that he stated at that time that he would turn such articles over to her, if she called for them. He then denied in his testimony that plaintiff or anybody in her behalf came to the hotel to remove her property after his agreement in June 1940 that she might remove same or that at or about the time he was served with the written demand or at any other time plaintiff or anyone in her behalf came to the hotel with an expressman and a truck, requesting permission to remove her property. According to plaintiff's testimony, plaintiff's property, which is admitted was in the hotel, is still there but, although he did not say so directly, he attempted to leave the inference that it was nothing but "junk."

According to plaintiff, the household furniture and furnishings, which she claims defendant refused to turn over to

her and were converted by them, belonged to persons who had been tenants of the hotel while she operated same and who moved out without paying her their rent and she took possession of such property and moved it into the basement storerooms to hold until such rent was paid. Plaintiff's right to the possession of the property in question was not disputed upon the trial. Ben Goldberg testified that he made an inventory of the property so held by plaintiff in the basement storerooms and as a result of his inventory made the list of the furniture and furnishings, which was set forth in the statement of claim and in plaintiff's written demand. The demand was received in evidence. Attached to the bill of sale executed by plaintiff and delivered to defendants on February 27, 1940, was an inventory of the furniture and furnishings in the hotel, which were included in the sale. None of the property involved herein was contained in said inventory. According to the testimony presented on plaintiff's behalf, three separate attempts were made to secure her property from the storerooms in the basement of the hotel premises and on each occasion defendants refused to permit its removal.

By reason of the testimony of Balasic that he admitted in June 1940, after the commencement of this suit, that practically all the property claimed by plaintiff was in the hotel at that time, he seems to have been driven to the position taken by him upon the trial that plaintiff's property or at least the major portion thereof was even then at the hotel, because plaintiff never took any steps to remove it. As opposed to the denial by Balasic that plaintiff ever attempted to remove her property, there is the testimony of Goldberg that he went to the hotel with an expressman and a truck for the purpose of removing such property on or about March 2, 1940 and again on or about March 29, 1940, when he made the written demand on defendants. Then there is the testimony of both plaintiff and Goldberg that they

man and were converted by them, belonging to persons who had been tenants of the hotel while she occupied same and who were out without paying her. Plaintiff and the hotel possession of such property and moved it into the basement storeroom to hold until such rent was paid. Plaintiff's claim to the possession of the property in question was not admitted at the trial. Plaintiff testified that he was an inventory of the property so held by himself in the basement storeroom and as a result of his inventory made the list of the contents and furnishings, which was set forth in the statement of claim and in Plaintiff's written demand. The demand was received in evidence. It was to the bill of sale executed by Plaintiff and delivered to the defendants on February 22, 1940, was an inventory of the contents and furnishings in the hotel, which were included in the sale. None of the property involved herein was contained in said inventory. According to the testimony presented on Plaintiff's behalf, three separate attempts were made to remove the property from the storerooms in the basement of the hotel between and on each occasion Plaintiff refused to permit the removal. By reason of the testimony of Plaintiff that he refused in June 1940, after the commencement of this suit, to permit all the property claimed by Plaintiff was in the hotel at that time, he seems to have been driven to the position taken by him upon the trial that Plaintiff's property or at least the major portion thereof was even then at the hotel, because Plaintiff never took any steps to remove it. As opposed to the claim by Plaintiff that Plaintiff ever attempted to remove the property, there is the testimony of Plaintiff that he went to the hotel with an express man and a truck for the purpose of removing such property on or about March 2, 1940 and again on or about March 29, 1940, when he made the written demand on defendants. Even there is the testimony of both Plaintiff and Goldberg that they

went to the hotel with an expressman and a truck in June 1940 to move the property, when Balasic admittedly told them that most of the property was at the hotel and that they might take it away.

Since it was admitted by Balasic that the articles of household furniture and furnishings involved herein, with a few exceptions, were in the hotel in June 1940 and since the evidence clearly shows that all of said household goods were in the basement storerooms when defendants took possession of the hotel premises on February 27, 1940 and that Balasic refused to permit plaintiff to remove said property, we are impelled to hold that the finding and judgment of the trial court were manifestly against the weight of the evidence.

The record discloses that during the direct examination of the defendant Balasic, he was examined by the trial court as follows:

"THE COURT: Do you remember being outside of the Courtroom in this building in June 1940? A. Yes, I do.

"Q. Was there a list submitted at that time? A list of personal property belonging to Mrs. Simon? A. Yes.

"Q. Was that list checked off? A. Yes, it was.

"Q. Did you at that time check off from that list a number of articles of household furniture that were still in the hotel belonging to Mrs. Simon? A. Yes, I did.

"Q. Where are those articles now? A. They are still lying there. I did not have anything to do with them.

Q. You have a list of them? A. Yes, they are still there.

"Q. They are still there in the hotel? A. Yes, they are."

At this point the trial judge, addressing plaintiff's counsel, stated: "What more do you want counsel. Go over there and take it."

The following colloquy then took place between the trial judge and plaintiff's counsel:

"MR. LEVY: We went there and wanted to get the household goods that were in the three room apartment and store rooms in

went to the hotel with an expressman and a truck in June 1940 to move the property, when Salas immediately told them that most of the property was at the hotel and that they might take it away.

Since it was admitted by Salas that the articles of household furnishings and other articles located herein, with a few exceptions, were in the hotel in June 1940 and since the evidence clearly shows that all of said household goods were in the basement storerooms when defendants took possession of the hotel premises on February 27, 1940, and that Salas refused to permit plaintiff to remove said property, it was held that the finding and judgment of the trial court were manifestly against the weight of the evidence.

The record discloses that during the direct examination of the defendant Salas, he was examined by the trial court as follows:

"THE COURT: Do you remember being outside of the court-room in this building in June 1940? Yes, I do.

"Q. Was there a list exhibited at that time of first of personal property belonging to Mrs. Salas? Yes, I do.

"Q. Was that list checked off? Yes, it was.

"Q. Did you at that time check off from that list a number of articles of household furnishings that were still in the hotel belonging to Mrs. Salas? Yes, I did.

"Q. Were there those articles now? Yes, they are still lying there. I did not have anything to do with them.

"Q. You have a list of them? Yes, they are still there.

"Q. They are still there in the hotel? Yes, they are."

At this point the trial judge, addressing plaintiff's counsel, stated: "What more do you want counsel, do over there and take it."

The following colloquy then took place between the trial judge and plaintiff's counsel:

"MR. LEVY: We went there and wanted to get the household goods that were in the third room apartment and store rooms in

the basement, not a pile of rubbish that the defendants had piled up in the center of the basement, which did not belong to the plaintiff.

"THE COURT: I understand that certain articles checked on the list outside of the Courtroom are still there. Why not go and take them.

"MR. LEVY: We did go and the defendants would not let us go to the storerooms. Counsel had a copy of the statement of claim filed, and outside the Courtroom he checked off with a pencil all the articles that belonged to Mrs. Simon and Balasic said he still has them and they agreed at that time to turn these goods over to us.

"THE COURT: They state that it is still over there.

"MR. LEVY: When Mr. Ben Goldberg and Mrs. Simon went over there with an expressman and a truck, and they went down to the basement with Mr. Balasic, he pointed to a pile of rubbish. Mrs. Simon told him, that is not our stuff and that all of her stuff is in the store rooms and the three room apartment in the basement and he would not let them go to the three room apartment or store rooms. He said there was nothing in there. That is the household stuff that we claimed that was in the three store rooms and the three room apartment in the basement. *** Some time around June 10, 1940, when the case came up here in Court we went out into the hall to settle this matter, and counsel for defendants had checked off the articles on his copy of the statement of claim filed in this case and he asked defendants if they still have those articles that belongs to the plaintiff, Balasic said 'Yes, with the exception of a couple of articles, they are all still there' *** And we went over there with an expressman and truck and they would not let us take that out of the store rooms and three room apartment in the basement.

"THE COURT: They state that that personal property is still in the basement and if you want it it is still there and you can go and get it. I will find the defendants not guilty."

In our original opinion filed in this cause we not only reversed the judgment of the trial court because it was against the manifest weight of the evidence but we entered judgment in this court in favor of plaintiff and against defendant.

Defendants assert in their petition for rehearing that, when the court brought the trial to an end by its peremptory finding, they had not completed the presentation of their evidence in support of their defense and that they were precluded from so doing by reason of the peremptory manner in which the trial was concluded. We think that under the circumstances they were deprived of the right to fully present their defense, solely through the unwarranted action of the trial court and without

the basement, not a bill of lading that the defendants had piled up in the center of the basement, which did not belong to the plaintiff.

"THE COURT: I understand that certain articles were on the first outside of the basement are still there. Why not go and take them."

"MR. LADD: We did go and the defendants would not let us go to the storeroom. Counsel had a copy of the statement of claim filed, and outside the storeroom he checked off with a pencil all the articles that belonged to Mrs. Simon and Laisie said he still had them and they agreed at that time to turn these goods over to us."

"THE COURT: They state that it is still over there."

"MR. LADD: When Mr. Ben Goldberg and Mrs. Simon went over there with an expressman and a truck, and they went down to the basement with Mr. Laisie, he pointed to a pile of rubbish. Mrs. Simon told him that it was not their stuff and that all of her stuff is in the storeroom and the three room apartment in the basement and he would not let them go to the three room apartment or store room. He said there was nothing in there. That is the house hold stuff that we checked that was in the three store rooms and the three room apartment in the basement. When this morning, June 15, 1935, when this case came up here in court we went out into the hall to settle this matter, and counsel for defendant had checked off the articles on his copy of the statement of claim filed in this case and he asked defendants if they still have those articles that belong to the plaintiff. Laisie said 'Yes, with the exception of a couple of articles, they are all still there.' And we went over there with an expressman and truck and they would not let us take that out of the store room and three room apartment in the basement."

"THE COURT: They state that that personal property is still in the basement and if you want it it is still there and you can go and get it. I will find the defendants not guilty."

In our original opinion filed in this case we not only reversed the judgment of the trial court because it was against the preponderant weight of the evidence but we entered judgment in this court in favor of plaintiff and against defendant. Defendants assert in their petition for rehearing that, when the court brought the trial to an end by its peremptory finding, they had not completed the presentation of their evidence in support of their defense and that they were precluded from so doing by reason of the peremptory manner in which the trial was concluded. We think that under the circumstances they were deprived of the right to fully present their defense, solely through the unwarranted action of the trial court and without

fault on their part. The trial judge apparently predicated his finding on the refusal of plaintiff's attorney to accede to the suggestion of the court, which was in the nature of a direction that "the personal property is still in the basement and if you want it it is still there and you can go and get it." Plaintiff's willingness "to go and get" the personal property in question at that time was not an issue in the case. If the trial judge had permitted the parties to fully present their evidence on the issues raised by the pleadings, another trial of this case might well have been avoided.

In our opinion neither plaintiff nor defendants were afforded a fair trial and the ends of justice will be best served by a retrial of this case.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

fault on their part. The claim that apparently resisted
his finding on the refusal of Plaintiff's attorney to concede
to the suggestion of the court, which was in the nature of a
direction that the personal property is still in the possession
and if you want it it is still there and you can go and get
it. Plaintiff's willingness to go and get the personal
property in question at that time was not in issue in the case.
If the trial judge had permitted the parties to fully present
their evidence on the issues raised by the pleadings, another
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In our opinion neither Plaintiff nor Defendant were
afforded a fair trial and the ends of justice will be best
served by a retrial of this case.

The judgment of the Municipal Court of Chicago is
reversed and the cause is remanded for a new trial.

THOMAS J. BRYAN, J.
CHIEF JUSTICE

Trinity, L. S., and Graham, L., counsel.

42769

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

BRUCE BORRELLI (Impleaded),
Plaintiff in Error.

470
) ERROR TO
) CRIMINAL COURT
) OF COOK COUNTY.
)

PER CURIAM.

3231A.230²

Bruce Borrelli was indicted in three cases in the Criminal court of Cook county; in No. 42-125 he was charged with conspiracy to injure certain employees of the Keeshin Motor Express Company; in No. 42-126 he was charged with conspiracy to injure one Gottlieb and one Roe; and in No. 42-127 he was charged with assault with intent to commit mayhem as to Gottlieb. Borrelli waived a jury and after the testimony was heard in 42-125, the other two causes were consolidated and submitted upon the previous testimony in so far as the same was applicable. Additional evidence was produced in the second hearing relating to the assault upon Gottlieb and Roe. The court found Borrelli guilty in the first case and sentenced him to one year in jail. In the second case he was found guilty of conspiracy and sentenced to one year in jail and to pay a fine; that sentence was made to run after the first one was served. As to the mayhem charge, Borrelli was found not guilty. The two causes in which he was convicted were consolidated for the purpose of review and taken directly to the Supreme court of Illinois on writ of error upon the theory that he had been deprived of due process as guaranteed by the fourteenth amendment of the United States constitution, but the court held that the ruling of the trial judge as to the admissibility of a confession, claimed to be involuntary, did not necessarily raise a constitutional question, and transferred the cause here for determination. (People v. Borrelli, 383 Ill. 17.)

In indictment No. 42-125 Lawrence Roche, Peter LaBarbera, Bruce Borrelli, John L. Keeshin, John Devlin and unknown persons

were charged in one count with conspiring to injure John Milich, Nick Wassell, Edward Mitchell and James Malizzio,, designating them as employees of the Keeshin Motor Express Company, Inc., and members of Union Local No. 705, active in a then recent strike. In indictment No. 42-126 Lawrence Roche, Peter LaBarbera, James McNally, Bruce Borrelli and John L. Keeshin were charged with conspiring together and with unknown persons to injure John Gottlieb and John Ralph Roe.

The indictments were returned after Borrelli had testified before the grand jury that shortly after he was employed by the Keeshin Motor Company as inspector, some trouble arose "around that plant on the morning of November 25th, 1941, when the fellows on the platform walked off and were going to strike;" that John L. Keeshin apprised him of the impending strike and told him "to hang around the yard and see that those other fellows did not try to promote a strike" and to ascertain the names of the leaders; that he had learned the names of those employed by Keeshin who were promoting the strike and "when they walked off the job at six o'clock in the morning, Mr. Keeshin gave me the names of the men to hit. I was in his office when I got the names, and just Keeshin was present. He said, 'These fellows are trying to promote trouble around here, *** I want them fired. *** Maybe you better punch them up a bit;" that pursuant to his instructions he accosted the men whose names had been given to him by Keeshin, accused them of "starting trouble around there," argued a bit, and "before I got hit I would hit them."

Keeshin was first tried before a jury and when Borrelli refused to testify for the state, Keeshin was found not guilty on a directed verdict, and the remaining cases were dismissed as to him. John Devlin was not apprehended and his case was stricken. LaBarbera and Roche, together with McNally, who was also indicted in the Gottlieb case, waived a jury and submitted their cases to

were charged in one count with conspiring to injure John Sullivan, vice president of the Boston Police Department, and members of Union Local No. 100, active in a labor union strike. In indictment No. 42-126 Lawrence John, Peter Lawrence, James McNelly, Bruce McNelly and John J. McNelly were charged with conspiring together and with unknown persons to injure John Sullivan and John Ralph Roe.

The indictments were returned after McNelly and Lawrence had been before the grand jury last month after he was called by the Boston Police Department as a witness, some time in March. Lawrence that night on the morning of November 1930, 1931, when the following on the platform walked off and were going to the street; that John J. Lawrence advised him of the impending strike and told him to go around the yard and see that those other fellows did not try to promote a strike; and to ascertain the names of the fellows; that he had learned the names of those employed by Lawrence the day promoting the strike and "when they walked out the day it was 6 o'clock in the morning, Mr. Lawrence gave me the names of the men to hit. I was in his office when I got the names, and that Lawrence was present. He said, 'These fellows are going to promote trouble around here, and I want them fixed. And before you better go down the up a bit;' that pursuant to his instructions he located the men whose names had been given to him by Lawrence, because they of "starting trouble around there," argued a bit, and before I got hit I could hit them."

Lawrence was first tried before a jury and when McNelly returned to testify for the state, Lawrence was found not guilty on a directed verdict, and the remaining cases were dismissed as to him. John Sullivan was not apprehended and his case was stricken. Lawrence and McNelly, together with McNelly, who was also indicted in the Goffie case, were a jury and submitted their case to

the court after Borrelli was tried, upon the testimony introduced in this proceeding, and each was fined \$100. Those fines were paid.

Substantially all of Borrelli's voluminous brief, consisting of more than 150 pages, is directed to the question whether Borrelli's confession before the grand jury was voluntary. It was admitted by Borrelli, who appeared as a witness in his own behalf, that he assaulted and struck Wassell, Mitchell and Milich, all employed by the Keeshin Motor Company, but he denied that Keeshin had directed him to do so and claimed that his testimony before the grand jury as to the implication of Keeshin was false; and he also denied that any conspiracy existed or that there was any connection between one assault and another. The theory of the state, supported by the confession before the grand jury and other evidence, was that these employees were the cause of a strike which arose at the Keeshin Company loading depot in Chicago and that Keeshin gave Borrelli their names, with the request that they be struck or beaten by Borrelli.

Borrelli did not testify in the Gottlieb case, it having been agreed between counsel that the testimony given in the previous case should be considered by the court in so far as it was relevant.

Considering first the question of the admissibility of the confession, Borrelli contends that the picture which might be reconstructed from facts and circumstances in evidence shows that it was involuntarily given, and his counsel advances some 40 different propositions to support the contention that the confession was induced by the expectation of a promised benefit to Borrelli, that it was not voluntarily made and was "testimonialy untrustworthy." There is no claim or suggestion that physical violence was used or threatened as to Borrelli.

Borrelli's counsel treats the evidence offered as to

the court after Corbelli was tried, when the testimony intro-
duced in this proceeding, and each was fined \$100. Those times
were paid.

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sisting of more than 150 pages, as directed to the question
whether Corbelli's confession before the grand jury was voluntary.
It was admitted by Corbelli, who appeared as a witness in his own
behalf, that he assaulted and struck Kesslin, himself and

Kesslin, all employed by the Kesslin Motor Company, and he admitted
that Kesslin had directed him to do so and advised that his testi-

mony before the grand jury as to the falsification of Kesslin's
false; and he also stated that any conspiracy related to that

there was any connection between one Kesslin and another, the
theory of the state, supported by the evidence before the

grand jury and other evidence, and that some employees were
the cause of a strike which arose at the Kesslin Motor Company located

depot in Chicago and that Kesslin gave Corbelli their names,
with the request that they be struck or beaten by Corbelli.

Corbelli did not testify in the Kesslin case, it being
agreed between counsel that the testimony given in the previous

case should be considered by the court in so far as it was
relevant.

Consequently, first the question of the voluntariness of
the confession, Corbelli contends that the state which sought
to reconstituted from facts and circumstances in evidence shows

that it was involuntarily given, and his counsel advances some
40 different propositions to support the contention that the

confession was induced by the expectation of a reduced sentence
to Corbelli, that it was not voluntarily made and was false.

Nonally untrue or "phony." There is no claim or suggestion that
physical violence was used or threatened as to Corbelli.

Corbelli's counsel treats the evidence offered as to

the admissibility of the confession under two headings. The first, referred to as the first "deal," discloses the following circumstances. The assaults on Keeshin's employees occurred late in November 1941. Borrelli was arrested on the afternoon of January 12, 1942 and, together with McNally, was taken to the state's attorney's office. While standing in the hall, Captain Daniel A. Gilbert ordered Borrelli locked up; McNally was presumably released. Gilbert testified that in the evening he told Borrelli that the state knew all about his movements, and accused him of beating the Keeshin employees. Borrelli stated that Gilbert said that he was a friend of Judge Borrelli, Bruce's father, and wanted to help defendant; that he was keeping newspaper men away in order to avoid publicity which would injure Judge Borrelli; and he thereupon proposed that if Borrelli would produce a couple of fellows willing to take a \$100 fine, Borrelli could go home and the case would be closed; that Borrelli accepted the proposal, and still later in the evening proceeded with Lieutenant Tom Kelly and another officer through the state's attorney's office, down the back fire escape to a telephone, where he made an appointment in a restaurant with Roche and LaBarbera to explain the "deal." The latter two appeared by appointment and conferred with Borrelli, while Kelly and the other officer had dinner in another part of the restaurant. Subsequently Borrelli met the two officers, related his conversation with Roche and LaBarbera, and instead of letting him go, according to Gilbert's purported promise, the officers took him back to the state's attorney's office, where Gilbert told him that the "deal" was off because the two men did not name Keeshin. Borrelli then claimed that he had been "double crossed" and refused to make a statement thereafter to Thomas J. Courtney, state's attorney, or Wilbert F. Crowley, his assistant, because they would not make him a promise. The next morning he was re-

The admissibility of the confession under two headings. The first, referred to as the "first issue," discloses the following circumstances. The assault on Cassin's employee occurred late in evening 1941. Forelli was arrested on the afternoon of January 12, 1942 and, together with Kelly, was taken to the state's attorney's office, while waiting in the hall, Captain Daniel A. Gilbert ordered Forelli locked up; Kelly was presumably released. Gilbert testified that in the evening he told Forelli that the state knew all about the movements, and accused him of beating the woman's employee. Forelli stated that Gilbert said that he was a friend of Kelly's father, and wanted to help him out; that he was being in the newspaper room in order to avoid publicity which would injure Kelly's father; and he threatened Forelli that if Forelli would produce a couple of fellow sailors in New York City, Forelli could go home and the case would be closed; that Forelli accepted the proposal, and still later in the evening proceeded with a statement for Kelly and another officer, Captain Kelly's attorney's office, from the back five steps to a telephone, where he made an appointment in a restaurant with Kelly and Labaree to explain the deal. The latter two appeared by appointment and conferred with Forelli, while Kelly and the other officer had dinner in another part of the restaurant. Subsequently Forelli met the two officers, related his conversation with Kelly and Labaree, and instead of letting them go, according to Gilbert's reported words, the officers took him back to the state's attorney's office, where Gilbert told him that the "deal" was off because the two men did not understand. Forelli then claimed that he had been "double crossed" and refused to make a statement thereafter to Thomas J. Courtney, state's attorney, or Gilbert A. Kelly, his assistant, because they would not make him a promise. The next morning he was re-

leased on bail pending disposition of a writ of habeas corpus.

It is contended, in effect, that the so-called first "deal" fell through because Captain Gilbert failed to keep his promise, and it is assumed and argued that Borrelli made admissions to Captain Gilbert at the time the so-called first "deal" was made. However, defendant testified that he at no time made any admissions or confession to Gilbert; that when taken to Crowley's office, after turning in Roche and LaBarbera, he made no admissions to Crowley or to anyone while he was in custody and until he appeared before the grand jury. It is undisputed that Crowley told him: "Borrelli, I can make you no promises of any kind whatever. All I can ask you to do is to tell the truth." Borrelli admits that no promises were made to him by Courtney, and Judge Borrelli, his father, who talked to Courtney, corroborates that statement. It should be added that Gilbert denied any so-called first "deal" with Borrelli. Under the circumstances we think the transactions herein related have no bearing whatever on the question of the admissibility of Borrelli's testimony before the grand jury; and that they are important only to the extent that Borrelli stated thereafter that he would not rely on anything Gilbert told him because, as he says, he was "double crossed."

The circumstances attending the so-called second "deal," which is purported to have resulted in Borrelli's testimony before the grand jury pursuant to a promise of immunity, may be summarized as follows. After Borrelli had given bail pending disposition of a writ of habeas corpus, he was released from custody. Two days later Judge Borrelli was called before the grand jury and requested by the jurors and the prosecutor to prevail upon his son to testify for the state, and the judge asked Gilbert to call at his (Judge Borrelli's) office to assist in inducing defendant to testify. Gilbert first secured per-

issued an writ of habeas corpus.
It is contended, in effect, that the so-called first
"deal" was through because Captain Gilbert failed to keep his
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statement to Captain Gilbert at the time the so-called first "deal"
was made. However, defendant testified that at no time was
any admissions or confession to Gilbert; and when taken to
Grovey's office, after turning in some other statement, he made
no admissions to Grovey or to anyone else. He was in custody
and until he appeared before the grand jury. It is suggested
that Grovey told him: "Corbelli, I am sorry for no witnesses
of any kind whatever. All I can ask you to do is to tell the
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Grovey, and Judge Corbelli, his father, and others in Corbelli's
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asked Gilbert to call at his (Judge Corbelli's) office to assist
in inducing defendant to testify. Gilbert first acceded,

mission from the state's attorney and then joined a conference between the judge, defendant and some of their friends. At that conference defendant decided to go before the grand jury, and appeared there as a witness the same evening. He contends that a new "deal" was made at the foregoing conference. Much space is devoted in the briefs to a discussion of the events that occurred in Judge Borrelli's office. The gravamen of Borrelli's claim is that Gilbert told him in this conference that he would not be indicted or charged with anything if he would go before the grand jury and implicate Keeshin by testifying that he had been employed by Keeshin to hire men to assist in "slugging" the employees. There is no evidence to indicate that preceding this conference Borrelli had ever told Gilbert that Keeshin had employed him for any such purpose or that he apprised Gilbert of any of the facts with respect to the "slugging," and the court evidently found it inconceivable that Gilbert would attempt to suborn perjury in the presence of Judge Borrelli and other witnesses. Gilbert and one other witness, who was present at the conference, denied that any such suggestions had been made. When Judge Borrelli first appeared as a witness at defendant's trial, he testified that before Gilbert appeared in his office, he had urged his son to testify to the truth before the grand jury, and stated that the substance of what he was to testify to before the grand jury was not discussed by anyone in his office. He further corroborated Gilbert's statement that he could not make any "deal," that he did not have the authority and that it was "up to the State's Attorney;" but that Gilbert had told him he was "sure that there will be probation, but *** he wouldn't take the responsibility." Judge Borrelli further testified that he told his son: "I want you to take my advice, I am your father," and that defendant became reconciled to the judge's advice and said he would testify before the grand

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that a new "deal" was made at the following conference. Much
was devoted in the brief to a discussion of the events
that occurred in Judge Correll's office. The defense of
Correll's claim is that Gilbert told him in this conference
that he would not be indicted or charged with anything if he
would go before the grand jury and testify according to what
he had been employed by reason to him as to assist
in "shaking" the employees. There is no evidence to indicate
that preceding this conference Correll had ever told Gilbert
that Correll had employed him for any and purpose or that he
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Gilbert would attempt to reopen history in the presence of Judge
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by anyone in his office. He further corroborated Gilbert's state-
ment that he could not make any "deal," that he did not have the
authority and that it was "up to the state's attorney;" but that
Gilbert had told him he was "sure that there will be protection,
but he wouldn't take the responsibility." Judge Correll
further testified that he told him now: "I want you to take my
advice, I am your father," and that defendant became reconciled
to the judge's advice and said he would testify before the grand

jury and tell the truth. Judge Borrelli said nothing about Gilbert's promise that no charge would be placed against defendant or that he would not be indicted, but he testified later that Gilbert had assured him that probation would be recommended and that he communicated that promise to his son.

Defendant states that after leaving his father's office, he proceeded to the grand jury room in the Criminal Court Building with his father and waited ten minutes before appearing before the grand jury; that during those ten minutes he talked to Gilbert and was assured that he would not be indicted. Gilbert testified that he was not present about the grand jury room before defendant entered it and did not talk to him at that time, and his testimony is corroborated by Judge Borrelli, who stated that Gilbert did not go to the Criminal Court Building with him and defendant, that he and his son went directly to the grand jury, that no one talked to Bruce, and that Captain Gilbert was not there. Gilbert's denial that he was present about the grand jury room before defendant entered is further corroborated by Officers Edward Griffin, Frank West, State's Attorney Courtney and his assistant Crowley.

It is Borrelli's contention that he was innocent of the charges of conspiracy, that he testified falsely before the grand jury and incriminated himself in his testimony solely at the request of Gilbert, who had purportedly "double crossed" him, whom he could not trust but who had promised him leniency if he would implicate Keeshin. It can be readily understood that the trial judge was unimpressed with this paradoxical explanation. If Borrelli was innocent of conspiracy, as he claims, it is difficult to understand why he should have desired to secure a promise of any kind and to have committed perjury and involved himself in a crime with others. If he had told what he now claims to be the truth, he could have exonerated himself and established

try and tell the truth. Judge Norrell said nothing about
Albert's promise that no charge would be placed against de-
fendant or that he would not be indicted, but he testified
later that Albert had promised him that protection would be
recommended and that he communicated that promise to his son,
defendant at that time. Leaving the witness's office,
he proceeded to the Grand Jury room in the Criminal Court Build-
ing with his father and waited there until a witness was called
before the Grand Jury; that during those ten minutes he talked
to Albert and was assured that he would not be indicted.
Albert testified that he was not present when the Grand Jury
room before defendant entered it and did not talk to him at that
time, and his testimony is corroborated by Judge Norrell, who
stated that Albert did not go to the Criminal Court Building
with him and defendant, that he and his son went directly to
the Grand Jury, that no one talked to him, and that defendant
Albert was not there. Albert's denial that he was present
about the time the Grand Jury room before defendant entered it is
corroborated by officers David Gelling, Frank West, State's
Attorney Courtney and his assistant Gowing.
It is Norrell's contention that he was ignorant of the
charges of conspiracy, that he testified falsely before the
Grand Jury and instructed himself in his testimony solely
at the request of Albert, who had reportedly "made a deal"
with him, whom he could not trust but who had promised him immunity.
It would be like to assume, it can be readily understood
that the trial judge was impressed with this contention and
inaction. If Norrell was ignorant of conspiracy, as he claims,
it is difficult to understand why he should have desired to secure
a promise of any kind and to have committed perjury and involved
himself in a crime with others. It is not told what he now claims
to be the truth, he could have executed himself and established

his innocence of the charge of conspiracy. Borrelli was no stranger to court procedure. He had served as a bailiff in his father's court and was aware of the fact that both Courtney and his assistant Crowley had refused to promise him leniency, and that Gilbert had no authority to override them in making any promises. Although defendant denied that his father had requested him to go to the grand jury before Captain Gilbert arrived at the afternoon conference, Judge Borrelli stated that after his own appearance before the grand jury and before Gilbert arrived at his chambers, he had talked to his son and requested him to appear before the grand jury and tell the truth. Upon the record presented, we have reached the conclusion that the trial judge, passing upon all the evidence bearing upon the confession, properly admitted Borrelli's testimony before the grand jury as having been voluntarily given.

The procedure prescribed in cases of this kind was strictly followed. The state, after making a prima facie case in which it was denied that there were any inducements, introduced a transcript of Borrelli's testimony given before the grand jury incriminating him and others, which was preceded by the signing of an immunity waiver and Borrelli's statement that "I know that I don't have to testify here unless I do so voluntarily." Under the ruling in People v. Ardelean, 368 Ill. 274, "The burden of producing evidence then shifts to the defense and the People may subsequently bring in evidence in rebuttal." In that case the court observed that because confessions are sometimes extorted by brutal means, if the defense has produced credible evidence tending to show that the confession was the result of coercion, the people to rebut, must call for examination, if practicable, all persons having authority or control over the person making the confession who were implicated in procuring it, but quoted with approval the holding in People v. Ziderowski, 325 Ill. 232, that "the rule requiring a showing that a confession is voluntary before it is competent evidence was not established to protect a

his innocence of the crime of conspiracy. Counsel for the defense
got to court procedure. The law says as a matter of fact that
court and was one of the first to go to court and his case
tant case and refused to pay his fee, and that although
had no authority to override them in making the process. Although
defendant denied that his father had requested him to do so
Grand Jury before defendant arrived at the defendant's court-
once, Judge Norrell stated that after his own personal view
the Grand Jury and before it arrived at its decision, in the
talked to his son and requested him to appear before the Grand Jury
and tell the truth. Upon the record presented, we have received the
conviction that the trial judge, seeing that all the evidence
bearing upon the confession, properly admitted defendant's testi-
mony before the Grand Jury as having been voluntarily given.
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was denied that there were any immunities, introduced a statement
of Norrell's testimony given before the Grand Jury and that the
him and others, which was received by the Grand Jury as true
waiver and Norrell's statement that "I know that I don't have to
testify here unless I do so voluntarily." In fact, he said in
People v. Norrell, 305 Ill. 574, "the burden of producing evi-
dence then shifts to the defense and the People may voluntarily
bring in evidence in rebuttal." In that case the court observed
that because confessions are sometimes extracted by brutal means,
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fession who were implicated in procuring it, but that with
approval the holding in People v. Norrell, 305 Ill. 574, that
"the rule requiring a showing that a confession is voluntary
before it is competent evidence was not a rule to protect a

guilty person against his truthful confession, but is designed to guard the innocent against a false confession made under duress, promise of reward of some nature or other inducement," and went on to say that "if sufficient facts are proved showing that a statement of guilt was freely made, a trial court may admit it in evidence although there may be some evidence of threats or promises," (emphasis ours), and cited People v. Costello, 320 Ill. 79, People v. Swift, 319 Ill. 359, and Bartley v. People, 156 Ill. 234. If confessions were to be excluded upon the mere submission of some evidence of promised immunity to the accused, it would be fairly impossible for the prosecutor to ever introduce a confession, even where the evidence, taken as a whole, clearly indicated that the confession was voluntarily made.

Defendant takes the position that a conspiracy could not have been proven without Borrelli's testimony before the grand jury. The record does not sustain that contention. Whether or not the confession was properly admitted, there is conclusive evidence to prove the conspiracies charged against Borrelli, without the confession. With Keeshin acquitted, as the trial judge noted in his opinion, any evidence defendant gave before the grand jury in respect to Keeshin, was necessarily disregarded by the court, and all that remained of Borrelli's confession was his testimony relating to the various assaults, which were conclusively proven by other witnesses upon the trial. He was, therefore, obviously not harmed by the confession. The facts supporting this conclusion may be summarized as follows. The state proved by the testimony of Wassell, Mitchell and Milich, all of whom were employees of Keeshin Motor Express Company and members of Union Local No. 705, that a strike was in progress at the Keeshin plant on November 24, 1941, in which these three men participated. At a meeting of

...ly between ... his ... confession, but is ...
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and went on to say that the ... are ...
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judge noted in his opinion, ...
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Motor Express Company and ... of ... that
a ... at the ... on November 24,
1931, in which these three ... at a meeting of

the union to select a committee on that date to confer with the management of the Keeshin Company, John Devlin, one of Keeshin's superintendents, was present and indicated his opposition to the strike. As the committee was being selected, Devlin pointed to John Milich and said, "Come here, John, you have been doing a lot of talking, you might as well be on the committee," indicating his attitude toward Milich. The three witnesses then disclosed that the committee conferred with the union steward, Tom Sheehan, and Mr. Gordy, vice president of the Keeshin Company, and expressed their request for time and a half for overtime, twenty cents' increase in wages, and a closed shop. Gordy said he would take the matter up with the company. At the same time the three employees who were members of the committee asked Gordy if this conference would cost them their jobs. On leaving the meeting, as they passed Devlin, he said, "Now, you guys are going to get it." Mitchell testified that on the following day he left work at 2:30 P.M. and as he passed through the gate two men asked his name and ordered him into an automobile. While sitting in the car he was struck 20 or 30 times by Borrelli, who was one of the two men. The car was then driven about a block and a half, where he was ordered out and told by Borrelli, "You don't work here any more, don't come back here." When he left the automobile he was bleeding from the mouth, his left eye was closing up, and his left ear and cheek bone were severely swollen.

Milich testified that two days later, as he arrived at the Keeshin plant at 3:00 A.M., a car flashed its lights on him as he approached the gate, and one of the men standing by said, "That is the car that was around the other day outside of the gate." He thereupon ran inside, into the basement, obtained his writing board, and was going out on a load when Devlin said to him, "Say, John, there is some fellows out there looking for you." Milich then told Devlin that he had just come to work

the union to select a committee on that date to confer with the
management of the business, John Devlin, one of Devlin's
superintendents, was present and indicated his opposition to the
action. As the committee was being selected, Devlin pointed to
John Devlin and said, "Now here, you have been doing a
lot of talking, you will be on the committee," indicating
his attitude toward Devlin. The three withdrew then discussed
that the committee conferred with John Devlin, John Devlin,
and Mr. Gordy, vice president of the business company, and dis-
cussed their request for time and a hall for meeting, twenty
cents, twelve in wages, and a closed hall. Gordy said he would
take the matter up with the company. At the same time the three
employees who were members of the committee when Gordy is told
conference would meet them that day. On leaving the meeting,
as they passed Devlin, he said, "Now, you are going to go
it." Mitchell testified that on the following day he went to
at 2:30 P.M. and he passed through the gate to the main building
and entered the into an automobile. While sitting in the
car he was struck on the head by Devlin, who was one of the
two men. The car was then driven about a block and a half, where
he was ordered out and told by Devlin, "You don't work here any
more, don't come back here." After he left the automobile he was
blacked from the back, the left eye was bleeding up, and his
left ear and cheek were severely swollen.

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"That is the car that was around the other day outside of the
gate." He then upon reaching into the car, obtained his
riding boot, and was going out on a road when Devlin said to
him, "Now, John, there is some fellows out there looking for
you." Mitchell then told Devlin that he had just come to work

and did not have permission to go out, whereupon Devlin replied, "You better go to see those fellows." Milich then suggested, "Maybe I ought to take a pipe along with me," and Devlin replied, "You better not if you know what is good for you." Following Devlin's orders, he went out and there noticed a group of men about a car. Borrelli, who was one of them, approached Milich, asked his name, and said he wanted to talk to him. As they were walking toward the gate Borrelli struck him in the face several times and said, "Now, get going, let that be a lesson to you, and don't come around on these premises again." Milich sustained two black eyes, his lip was cut, his mouth was swollen, four teeth were knocked out of his plate and his nose continued to bleed for two weeks thereafter.

Wassell testified that Devlin had manifested a dislike toward him two weeks prior to the strike and threatened to fire him. Although he was not a member of the committee on November 24, he testified that two or three days later, when he arrived at the Keeshin plant at 3:45 A.M., someone knocked on the window of his car and asked his name. As he walked toward the gate, someone turned him around and knocked him down. As he arose he discovered it was Borrelli who had strick him. Borrelli then said, "All right, get going, and forget all about this, don't say nothing to nobody, don't ever come back here again."

Borrelli attempted to justify these brutal assaults by contending that when he approached the men they struck at him, and in self-defense he had to strike back. With respect to the foregoing evidence, the trial judge made the following observation: "The State proved beyond a reasonable doubt that these three employees were slugged and beaten by the defendant as a result of a conspiracy with Roche, LaBarbera and Devlin, because of their agitations and disturbances. Such labor terrorism and violence must be halted if we are to maintain an orderly society.

and did not have permission to go out, when on Devlin
replied, "You better go to see those fellows." William then
suggested, "Maybe I ought to take a drive along with you," and
Devlin replied, "You better not if you know what is good for
you." Following Devlin's orders, he went out and there
noticed a group of men about a car. Horrified, who was one
of them, approached William, asked him some questions and invited
to talk to him. As they were walking toward the gate Devlin
warned him in the face several times and said, "Now, get going,
let that be a lesson to you, and don't come around here no more
any more." William replied, "You know what, this is my
car, this is my car, this is my car, this is my car, and of this
gate and the house behind it I paid for two years there for.
Rassell testified that Devlin had mentioned a dislike
toward him two weeks prior to the attack and threatened to fire
him. Although he was not a member of the committee on November
24, he testified that two or three days later, when he arrived
at the location about 3:45 p.m., someone knocked on the window
of his car and asked him to get out. As he walked toward the gate,
someone turned him around and looked him down. As he crossed
the discovered it was Horrified who was looking at him. Horrified
then said, "All right, get going, get going, get going all about this,
don't say nothing to nobody, don't say anything to nobody."
Horrified attempted to justify these brutal assaults by
contending that when he approached the car they turned at him,
and in self-defense he had to strike back. With respect to the
foregoing evidence, the trial judge made the following observa-
tion: "The state proved beyond a reasonable doubt that these
three employees were seized and beaten by the defendant as a
result of a conspiracy with some persons in Devlin, because
of their agitation and disturbances. This is a serious crime and
violence must be visited if we are to maintain an orderly society."

*** This Court does not propose to comment upon all the re-criminations, but it emphatically denounces as false defendant's claim that Roche and LaBarbera were stooges furnished by him at the instance of the State. Also, defendant's contention that he assaulted the prosecuting witnesses in self-defense, resulting from his investigation of their criminal records or personal involvements, is preposterous and unworthy of belief." There can be no reasonable doubt that Borrelli's assaults on the three men were wanton and made in pursuance of a preconceived plan. Borrelli admitted on cross-examination that he knew a strike was in progress and that he was acquainted with Devlin. He also stated that on many occasions LaBarbera and Roche were with him. Devlin did not testify, nor did Gordy, vice president of the Keeshin Company. What conclusion could any court or jury fairly or honestly draw from these facts, except that Borrelli, acting in consort with some of the persons named in the indictment, struck and injured Milich, Wassell and Mitchell in pursuance of the conspiracy charged in the indictment? Although the common design is the essence of the charge of conspiracy, it is not necessary to prove that the alleged conspirators came together and actually agreed, in terms, to have that design and to pursue it by common means. If it is proved that they pursued by their acts the same object, often by the same means, one performing one part, another performing another part of the same, so as to complete it with a view to the attainment of that object, the conclusion will be justified that they were engaged in a conspiracy to effect that object. It was so held in the leading case of Spies v. The People, 122 Ill. 1, and consistently followed ever since.

In support of indictment, No. 42-126, the state produced the following evidence, which is undisputed. John Gottlieb was president of the Pioneer Motor Service, Inc., one of Keeshin's competitors, with whom Keeshin had had disputes, by his own

This Court does not propose to accept upon all the re-
 examinations, but it will accept the testimony of the witnesses
 and of the fact that the witnesses were exposed to the
 influence of the State, and, therefore, the Court is satisfied
 that the admitted the possibility of the witnesses in self-interest, in-
 addition from the investigation of their criminal records or
 personal involvements, in respect to the possibility of belief."
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 Devlin were with him. Devlin did not testify, nor did Devlin,
 vice president of the Devlin Company. The Court is satisfied
 any court or jury fairly or honestly could find these facts,
 except that the Court, acting in concert with some of the persons
 named in the indictment, struck and injured others, and all the
 Mitchell in the presence of the Court and others in the indus-
 try. Although the common feature is the nature of the charge
 of conspiracy, it is not necessary to prove that the alleged
 conspirators came together and actually agreed, in fact, to
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 proved that they entered by their acts the same object, either
 by the same means, one performing one part, another performing
 another part of the same, so as to complete it with a view to
 the attainment of that object, the conspiracy will be established
 that they were engaged in a conspiracy to effect that object.
 It was so held in the leading case of United States v. The People, 12
 Ill. 1, and consistently followed ever since.
 In support of indictment No. 42-110, the State produced
 the following evidence, which is undisputed. John Devlin was
 president of the Pioneer Motor Service, Inc., one of Devlin's
 competitors, with whom Devlin had had disputes, by his own

admission. On the evening of January 6, 1942, Gottlieb left Henrici's Restaurant in the company of his wife and Mrs. Leydon, and was driven by his chauffeur, John Roe, to Mrs. Leydon's home at 49th and Dorchester avenue, where she left the car. From there they drove to Gottlieb's home on 50th street. When the car stopped Gottlieb and his wife stepped out, and as he was approaching the door of his home he saw four men get out of another car and walk toward him. One of the men, who had his hand in his pocket, said, "I want to talk to you." Gottlieb told his wife to go into the house, and when he looked around, these men were on top of him and began to assault him. Two of the men struck him, and when he raised his arm to defend himself, he was struck on the jaw by Borrelli, and his jaw was broken. He reported the matter to Gilbert at the state's attorney's office and later that evening he identified Roche and LaBarbera as having been with Borrelli when the assault occurred. Gottlieb also testified that he saw Borrelli January 3 at the Sherman Hotel talking to house officer Murphy. He had never had any trouble with Borrelli, Roche, LaBarbera or McNally. His dispute with Keeshin grew out of negotiations for a contract with Union No. 710, when he was a member of the negotiating committee. He testified that in the heat of an argument with Keeshin, the latter told him to shut up and not to speak to him, and that "I will take care of you." Roe corroborated Gottlieb's testimony as to the assault, identified McNally as one of the assailants, and stated that he had never had any difficulty with Borrelli, Roche, LaBarbera or Keeshin. Daniel Murphy, a house officer of the Hotel Sherman, testified that he had a conversation with Borrelli in the lobby of said hotel between Christmas and New Year's preceding the assault on Gottlieb, in which Borrelli asked him to point out Gottlieb, and he states that when Gottlieb appeared later he pointed him out to Borrelli. Defendant did not testify in this case, nor did he offer any evidence to rebut

...on the evening of January 6, 1942, testified that ...
...testament in the ... of his wife and ...
...and was driven by his chauffeur, ... to ...
...at 4:30 and ...
...there they drove to ...
...for the ...
...opening the door of his ...
...another car and ...
...land in his pocket, said, "I want to ..."
...told his wife to ...
...these men were on top of him and began to ...
...the men struck him, ...
...he was struck on the jaw by ...
...reported the matter to ...
...and later that evening ...
...having been with ...
...also testified that he saw ...
...total talking to ...
...trouble with ...
...with ...
...No. 720, when he was a member of the ...
...testified that in the heat of an argument with ...
...latter told him to shut up and not to speak to him, and that ...
...will take care of you." ...
...as to the ...
...and stated that he had never ...
...local, ...
...of the ...
...Borrelli in the lobby of said hotel between ...
...years preceding the assault on ...
...his to point out ...
...appeared later he pointed him out to ...
...not testify in this case, nor did he offer any evidence to

that adduced by the state as to the assaults. The only evidence offered was the testimony of Keeshin, who stated on cross-examination that he had a dispute with Gottlieb when they met in the union hall while a strike was in progress. He said he told Gottlieb that he thought he was unfair and unethical, and did not wish to speak to him in the future. The undisputed facts in this case lead undeniably to the conclusion that Gottlieb was assaulted by Borrelli and his associates in pursuance of a plan. No other explanation is offered and no defense to the brutal "slugging" of Gottlieb is even suggested.

Various other questions are raised, but we think they are without merit. The record indicates that defendant was given a fair and impartial trial. "The object of the review of judgments of trial courts by courts of appellate jurisdiction is not to determine whether the record is free from error, but is to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, after a trial in which no error has occurred which might be prejudicial to the defendant's rights." (People v. Stover, 317 Ill. 191.) In our opinion it would be a travesty on justice to allow defendant a new trial upon the record presented. The fact that he had for years been a bailiff in the court presided over by his father, and an officer of the court, serves only to aggravate the seriousness of his criminal attacks. The judgment of the Criminal court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

42769

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

BRUCE BORRELLI (Impleaded),
Plaintiff in Error.

470
A
ERROR TO CRIMINAL
COURT, COOK COUNTY.

323 I.A. 280³

ADDITIONAL OPINION ON PETITION FOR REHEARING.

In defendant's petition for rehearing his counsel says that we have "totally ignored one aspect of the question as to the admissibility of defendant's grand jury statement, and have refused to notice" People v. Vinci, 295 Ill. 419, which is said to hold that when a confession is obtained by the prosecution pursuant to an understanding that it is not for use against the confessor but is part of an arrangement to prosecute others implicated by the confession, such statement upon a subsequent prosecution of the confessor is not voluntary and cannot be introduced against him. The Vinci case does not help defendant. It there appears that after Maurice Enright, a labor leader, was murdered while sitting at the wheel of his automobile in front of his residence in Chicago as the result of shots fired by some unknown person riding in a curtained automobile driven slowly past the Enright car, the police officers operating out of the state's attorney's office arrested Corrozzo, Murphy and Cosmano for Enright's murder. In Cosmano's room the police found a notebook containing the telephone number of the Emery Motor Livery Company, and in looking over the list of chauffeurs, found the name of James Vinci, who was thereupon arrested about 6:30 Wednesday evening, February 11, 1920. No warrant had been issued for his arrest, and he had not been taken before a magistrate for examination. No one was permitted to communicate with him except by permission of the state's

65-10

In defendant's petition for habeas corpus, it is stated that he was "totally ignorant of the location of the automobile" and that he was "totally ignorant of the location of the automobile" and that he was "totally ignorant of the location of the automobile". It is also stated that he was "totally ignorant of the location of the automobile" and that he was "totally ignorant of the location of the automobile".

attorney's office, and he was purposely confined in different outlying police stations so that he could not get in touch with any of his friends. After almost continuous interrogation over a period of three days and four nights, Vinci asked the state's attorney what he was going to do for him, and the state's attorney replied that if he testified on behalf of the people at the prosecution of Murphy, Corrozzo and Cosmano, he would endeavor to procure his freedom. Thereafter Vinci testified before the grand jury and the suspects were indicted for Enright's murder. Shortly before their trial Vinci repudiated his confession and refused to testify. He was then tried and convicted for the murder of Enright and sentenced to serve fourteen years' imprisonment in the penitentiary. The judgment was reversed by the Supreme court on the ground that the confession upon which he was convicted was involuntary and therefore inadmissible. It was claimed by Vinci that he had been kicked, beaten and otherwise mistreated in the course of his examination while in the custody of the police, and threatened with violence of various kinds. Substantially all these statements were denied by the officers, and it appears that neither the trial court nor the jury believed these charges. In the course of its opinion the Supreme court indicated that it did not believe that any physical force was used nor that direct threats or promises were made, but said: "There can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water on a rock, finally wore through Vinci's mental resolution of silence. Admittedly his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. The examination was persisted in by turns until plaintiff in error finally yielded to the importunities of his questioners and gave answers which they

sought. It seems clear to us that the accused became convinced that he was bound to make a statement to secure relief from the continuous questioning of those having him in charge, and under the circumstances we do not see how a confession thus obtained can be said to be voluntary."

The circumstances of the case at bar are not in the remotest respect comparable to the facts in the Vinci case. Borrelli makes no claim that he was mistreated. When he appeared before the grand jury and for some time prior thereto, he was not in custody, but was constantly advised by and under the protection of his father, who persuaded him to go before the grand jury and tell the truth. Judge Borrelli testified that he took his son to the grand jury, "that nobody talked to him, he went straight in," that his son said "he would take my advice on it and testify and tell the truth." No other conclusion can fairly be drawn from the facts of record than that defendant made the confession because his father induced him to do so. His father, upon whose advice defendant relied, admittedly received no promise of any kind from either State's Attorney Courtney or his assistant Crowley. Judge Borrelli testified in substance that when he talked to Courtney about his son, before defendant made his statement to the grand jury, Courtney did not give him any promise whatsoever. Courtney testified that he told Judge Borrelli: "**** after all, your son is a hoodlum, he got himself into this and we want him to tell the truth, nobody else got him into it, he got himself into it and even though you are his father, nevertheless your son is a hoodlum." Courtney's statement was not denied. The logical sequence of defendant's argument is that Judge Borrelli, because of an alleged promise made to him by Gilbert, was willing to have his son go before the grand jury and testify falsely. That argument is an unwarranted reflection

... It seems clear to us that the accused...
... which that he was found to have a statement to...
... the... of those having... in charge,
... and under the circumstances we do not see how a...
... that obtained can be said to be...
... The circumstances of the case are not in the
... remotest... to the facts in the... case.
... Corbett and claim that he was... when he
... appeared before the Grand Jury and... the...
... so, he was not in... but was... by and
... under the protection of the... who... him to go
... before the Grand Jury and... Judge Corbett
... testified that he took him to the Grand Jury...
... taken to him, he went straight... and...
... well... on it and... and...
... the other... can fairly be... from the... of
... that... the... because the
... that... to do so. The... and...
... and... as... of any...
... to... on his...
... testified in... he... to
... about the... his... to
... the Grand Jury... and...
... even... Judge Corbett...
... and... into...
... to tell the truth, nobody else got... into it, he
... into it and even... you the... never-
... Corbett's statement was not
... The logical... of... is that
... because of an... made to him by
... was willing to... the Grand Jury
... that... is an... and... falsely.

on Judge Borrelli.

Defendant relies upon the Vinci case as holding that when a confession is obtained by the prosecution pursuant to an understanding that it is not for use against the confessor but is part of an arrangement to prosecute others implicated by the confession, such statement upon a subsequent prosecution of the confessor is not voluntary and cannot be introduced against him. We do not understand that decision as holding that Vinci's confession was inadmissible because it was obtained pursuant to any such understanding. In the forepart of its opinion the Supreme court held that the confession was clearly inadmissible because it was obtained under circumstances which "finally were through Vinci's mental resolution of silence" and therefore not voluntary. Toward the end of the opinion the court says that "it was not their idea that plaintiff in error had any reason for killing Enright or that he had anything to do with the laying of the murder plot" and that "Evidently the object of interrogating plaintiff in error was not to secure from him a voluntary confession with a view to prosecuting him, but the object was to secure from him a statement for the purpose of making him a witness for the prosecution," and the court concludes that "Without the confession of plaintiff in error there is not a scintilla of evidence identifying the murderers of Enright. If there was other evidence in the record showing the guilt of plaintiff in error the admission of this confession would not necessarily require the reversal of the judgment. Holding, as we do, that the confession was not admissible there is no evidence to sustain the judgment, and it is therefore reversed." In other words, when the Supreme court said that the object of interrogating defendant was to secure from him a statement for the purpose of making him a witness for the prosecution, they had already emphatically held that the confession was not

voluntarily made.

In his petition for rehearing defendant emphasizes the fact that Keeshin was acquitted upon his trial. The indictments charge that Roche, LaBarbera, Borrelli, Keeshin, Devlin and unknown persons conspired to injure Milich, Wassell, Mitchell and Malizzio, as well as Gottlieb and John Ralph Roe. It was not necessary to prove all of the defendants charged in the complaints guilty. In a conspiracy charge, all may be found guilty, or some found guilty and others acquitted. The state would have the right to prove the acts of a conspirator done in pursuance of the conspiracy charged, even though he were not named in the indictment, and the fact that Keeshin was acquitted upon his trial would not make incompetent upon the trial of Borrelli evidence tending to show Keeshin's connection with the alleged conspiracy.

The principal other contention made in the petition for rehearing is that without the confession the evidence at most shows only that Borrelli committed certain assaults, but that it fails to show him guilty of the conspiracy charged. The indictments charge a conspiracy between Borrelli and others to commit the assaults, and as indicated in our original opinion, the evidence proves that charge beyond a reasonable doubt. No other reasonable conclusion could fairly be drawn from the evidence than that Borrelli's assaults were committed in pursuance of the conspiracy charged.

For the reasons indicated, we adhere to our opinion heretofore filed. The petition for rehearing is therefore denied.

PETITION FOR REHEARING DENIED.

voluntarily made.

In the position for which the defendant was charged the

fact that the defendant was charged with the crime of

charge that the defendant was charged with the crime of

unknown persons conspired to commit the crime, it was

and likewise, as well as the fact that the defendant

not necessary to prove all of the elements charged in the

complaints fully, in a conspiracy charge, it may be found

guilty, or some form guilty and others acquitted. The state

would have the right to prove the facts of a conspiracy

in evidence of the conspiracy charge, even though it was

not named in the indictment, and the fact that the

admitted that the fact would not make any difference

the trial of the defendant would be found in the evidence

connected with the alleged conspiracy.

The defendant's other testimony was in the position

for testimony to that effect the defendant was evidence

at most shows only that the defendant committed the crime

but that it fails to show the guilt of the conspiracy charge.

The indictment charge a conspiracy between the defendant and others

to commit the crime, and it is stated in the indictment

opinion, the evidence shows that the defendant was a

honest, so other persons' testimony would likely be found

from the evidence that the defendant's testimony was

in evidence of the conspiracy charge.

For the reasons stated, we agree to the opinion

heretofore filed. The motion for reversal is

denied.

RECEIVED THE CLERK OF THE COURT

42563

MILDRED GARRETT,

Appellant,

NATIONAL CASUALTY COMPANY,
corporation,

Appellee.

323 I.A. 281

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

46-13

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by the insured on a hospital expense policy. Judgment after trial without a jury was for defendant and plaintiff appeals.

In her application for the policy, plaintiff stated that she was sound and healthy, had not had medical or surgical advice or departure from good health within the previous 7 years and had never been advised to have a surgical operation. The policy issued March 29, 1940 and all premiums due were paid. On August 16, 1941 an appendectomy was performed upon her in the Augustana Hospital in Chicago by Dr. Percy. She sued the Insurance Company for \$197 expenses in connection with her hospitalization. Defendant's position is that plaintiff was barred from recovery by reason of her agreement in the application that she should be barred in the event of false representations material to the risk or made with the intention to deceive. In its answer defendant averred that for 8 years before the operation, plaintiff had suffered from appendicitis and a female disorder which necessitated the operation. This was denied in reply.

At the trial plaintiff gave her name and address, introduced the policy, the acknowledgment by defendant of her claim, and the hospital bills. At this point defendant admitted the establishment of a prima facie case. On cross examination plaintiff identified the

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claim, part of which, signed by her, indicated that the first symptoms of the appendicitis appeared July 15, 1941 and that she was first attended by Dr. Percy August 15, 1941, the date of her admission to the hospital, and that she had had no previous medical attention; and another part signed by Dr. Percy that he first attended plaintiff on June 14, 1940, that her appendicitis was chronic, that the sickness began August 14, 1941 and that she had no constitutional disease, physical defects or deformities. She also identified a letter written by Dr. Percy October 11, 1941, stating that he first saw her June 14, 1940, when he advised an appendectomy and had not seen her again until 1941, and had written the letter at her request. She said she did not remember telling the interne her medical history, when admitted to the Hospital; that she did not remember telling him that 8 years before a doctor had advised an appendectomy; that she might have said that, but that it was not true and she had not talked to a doctor at that time; that she had not been suffering from chronic appendicitis for a period of 8 years prior to the time of this application; that she did not remember telling her whole prior medical history at the Augustana Hospital, but was asked a lot of questions by the interne and was so sick she did not remember anything. She testified on redirect examination that in June 1940, she had seen Dr. Percy, but was not told to have an appendectomy; that she had severe abdominal pains since she commenced having menstrual periods; that in June 1940 she saw Dr. Percy, but not about the appendicitis, but about the stomach pains, and that he then advised her to have an appendectomy. It is apparent that this contradiction does not refer to surgical advice prior to the application. On redirect she further said she had not seen a doctor in 10 years; had not lost work on account of the recurring stomach pains; that at the time she signed the application no doctor

of the hysterical aspect of the case, and that she was first
attacked by Dr. Percy, August 10, 1941, the date of her admission
to the hospital, and that she had no previous medical attention;
and another part signed by Dr. Percy, dated the first attended physician
on June 14, 1940, that her hysterical was chronic, that the attacks
began August 10, 1941 and that she was an hysterical patient,
physical defects or deformities. The first admission is dated with
by Dr. Percy October 11, 1941, stating that the first was June 10,
1940, when he advised an hysterectomy and that she was again
until 1941, and that she was the latter of her hysterical. She said she
did not remember seeing the doctor for hysterical attacks, when
admitted to the hospital; that she did not remember seeing the doctor
8 years before a doctor did advised an hysterectomy; that she might
have said that, but that it was not true and was not stated to
a doctor at that time; that she had not been hysterical for several
years before for a period of 8 years prior to the date of her
admission; that she did not remember seeing the doctor when she was
admitted to the hospital, but that she was a lot of hysterical
the interne and she also did not remember seeing the doctor
on the first examination that in June 1941, the date of Dr. Percy, but
she not told to have an hysterectomy; that she did not remember
seeing either she commenced having hysterical attacks; that in June 1940
she saw Dr. Percy, but not about the hysterical, but about the state of
again, and that he then advised her to have an hysterectomy. It is
apparent that this contradiction does not refer to hysterical advice
prior to the hysterectomy. On further and further said she had not
seen a doctor in 10 years; had not lost work on account of the hysterical
attacks again; that at the time she signed the hysterical no doctor

had told her she had appendicitis and had never seen a doctor about that prior to June 1940 and that when she signed the application March 18, 1940, she believed her health was normal and that the pains were natural. On recross examination she repeated her testimony relating to the medical history given the interne.

The only defense witness was a librarian at the Augustana Hospital, custodian of the records. She identified two exhibits, each containing several sheets and written by various clerks, nurses, internes and doctors. These exhibits are not in evidence. The witness read from a sheet written by Dr. Was, an interne, and also from a sheet written by the admission clerk. The latter referred to plaintiff's medical history and indicated she had informed the clerk that she was advised 8 years before to have her appendix removed and for four years prior to her admission had had abdominal pain every three or four months. There were further readings from sheets referring to her daily condition and to the operation, but the record does not show who prepared the sheets or made the entries. In rebuttal plaintiff testified that she had no remembrance of telling what appeared in the record of her history and repeated her denial of the facts.

At the conclusion of the evidence the trial court said plaintiff had not established her case by a preponderance of the evidence.

The trial court committed error in permitting the reading from the records made by Dr. Was and the admission clerk, since there was no showing they were not available as witnesses. Branch v. Woulfe, 300 Ill. App. 472. It is true that other records were written by doctors whose absence was accounted for, but, so far as the transcript of testimony shows, no readings were made from those records.

had told her she had penicillin and had never seen a doctor about that prior to June 1940 and that when she signed the affidavit March 18, 1940, the defendant had said it was natural and that the signs were natural. On previous examination she reviewed her testimony relating to the medical history given the defendant.

The only defense witness was a physician at the defendant's hospital, custodian of the records. She identified two records, each containing several sheets and written by various nurses, nurses and doctors. These records are not in evidence. The witness read from a sheet written by Dr. [redacted] and also from a sheet written by the defendant's sister. The latter referred to defendant's medical history and indicated she had informed the doctor that she was advised 8 years before to have her [redacted] removed and that from time prior to her admission had been [redacted] every three or four months. There were further [redacted] from [redacted] referring to her daily condition and to her [redacted] and the records do not show the [redacted] of [redacted] or [redacted]. In rebuttal plaintiff testified that she had no recollection of telling what [redacted] in the record of her illness and [redacted] very detail of the facts.

At the conclusion of the evidence the jury found that plaintiff had not established her case by a preponderance of the evidence. The trial court [redacted] after [redacted] the finding.

From the records made by Dr. [redacted] and the defendant's sister, it appears there was no showing they were not reliable as witnesses. Smith v. Smith, 100 Ill. App. 477. It is true that other records were written by doctors whose names are [redacted] but, as far as the [redacted] of testimony [redacted], no findings were made from those

The defendant had the burden of establishing its affirmative defense that plaintiff had chronic appendicitis for several years prior to the application and had been advised to undergo an appendectomy. The letter written by Dr. Percy is not helpful for it refers to occasions following the application. That part of the claim prepared by him, however, states that her condition of appendicitis was chronic until her hospitalization. This is evidence which tends to prove part of the affirmative defense. Since the medical records should not have been admitted, there was no competent evidence before the court that any doctor prior to the application had advised her to undergo an appendectomy. We find Dr. Percy's statement in the claim standing against the repeated denials of plaintiff. It is apparent from plaintiff's testimony, that she merely brought the form of claim to Dr. Percy and did not discuss it with him, that his statement that her disease was chronic was his own opinion. Dr. Percy did not testify and there was no explanation of the ambiguity in his statements in the claim that her sickness was chronic, and that it began August 14, 1941.

Under these circumstances we believe the judgment is against the manifest weight of the evidence and it is, therefore, reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND BURKE, J. CONCUR.

The defendant and the witness of the defendant's affidavit
defence that the defendant had chronic alcoholism for several years prior
to the collision and had been advised by doctors and psychologists
The letter written by Dr. Terry is not dated but it refers to
occasions following the accident. That part of the affidavit
by him, however, states that the condition of the defendant was chronic
until her hospitalization. This is evidence which tends to show
part of the affirmative defense. Since the medical records should
not have been admitted, there was no competent evidence before the
court that any doctor prior to the collision had advised her to
undergo an amputation. We find Dr. Terry's statement in the affidavit
standing without the repeated denial of the defendant. It is competent
from plaintiff's testimony, that the records showed the fact of this
to Dr. Terry and did not discuss it with him, that his statement that
her disease was chronic was his own opinion. Dr. Terry will not testify
and there was no mention of the condition in the statement in the
affidavit that her disease was chronic, and that it was chronic in 1941.
Under these circumstances we believe the judgment is
against the defendant. Weight of the evidence and of the testimony
reversed and the cause is remanded for a new trial.

42581

R.M. KANIK,

Appellee,

v.

JOHNSON BROTHERS HEATING CO., a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

454
323 I.A. 282

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action upon an assigned account with judgment for plaintiff in amount of \$1,134.75, in which the court after considering the pleadings, plaintiff's motion for summary judgment, affidavits and counter affidavits and evidence, found that plaintiff was entitled to a summary judgment and had maintained the issues by proper and sufficient evidence. Defendant appeals.

Plaintiff sues as purchaser of the account at an auction under a Wisconsin court order winding up the receivership of the Moloch Foundry & Machine Company. Davis, doing business as American Casting Service, assigned the account amounting to \$979.64 to Roloff, receiver for Moloch. It represented merchandise made by Moloch and sold by Davis to defendant. The answer avers that the assignment was merely to secure Davis' American Casting Service account with Moloch; that Davis later paid the main account in full, after which defendant paid him its account after making certain deductions, to which the assignment was subject; and that the receiver had no right in the account thereafter and that plaintiff acquired no right at the auction. A later defense denied the sale of the account. There was no reply.

Plaintiff moved for summary judgment and, from the affidavits, counter affidavits and exhibits, it appears that Davis assigned the account unconditionally, advising Moloch that he was sending a copy of the assignment to defendant, instructing it to pay the account direct to Moloch but not mentioning deductions; that he wrote the defendant of the assignment, giving it the

JAMES BROWN & SONS, INC.
CORPORATION,
v.
J. M. HALL,
Defendant.

STATE OF NEW YORK
COUNTY OF NEW YORK

IN SENATE
JANUARY 11, 1933

THE JUSTICE CLERK DELIVERED THE VERDICT OF THE COURT.

This is an action upon an account rendered with judgment

for plaintiff in amount of \$1,144.75, in which the court after
considering the evidence, plaintiff's motion for summary judgment,
affidavits and counter affidavits and evidence, found that plain-
tiff was entitled to a summary judgment and the defendant's
issues by proper and sufficient evidence. Defendant's issues.

Plaintiff was a purchaser of the account of an auction
under a license from court order binding on the representatives of the
Holoch Laundry & Machine Company, Inc., doing business as
American Dyeing Service, which the account amounted to \$1,144.75.
to Holoch, received for Holoch. It represented merchandise made by
Holoch and sold by him to defendant. The answer denies that the
assignment was made to secure Davis' services as a service
account with Holoch; that Davis later paid the said account in
full, after which defendant paid him the account after making certain
deductions, to which the assignment was subject; and that the
receiver had no right in the account thereafter and that plaintiff
acquired no right of the account. A later answer denied the sale
of the account. There was no reply.

Plaintiff moved for summary judgment and, from the affi-
davits, counter affidavits and evidence, it appears that Davis
assigned the account unconditionally, advising Holoch that he was
sending a copy of the assignment to defendant, instructing it to
pay the account direct to Holoch but not mentioning deductions;
that he wrote the defendant of the assignment, giving it the

instruction and informing it that it had the right to make deductions for faulty quality and workmanship; that the assignment to Moloch is dated January 31, 1938, while the letter to defendant, " * * * we have this date assigned * * *" is dated January 28, 1938; that May 19, 1938, Roloff wrote Davis that Moloch was not crediting Davis' American Casting account with the full amount of defendant's assigned account, but only with what was collected and that the assignment was simply a protection for the Company; and that enclosed in the last letter was a copy of a letter which Roloff wrote defendant confirming an earlier conversation that the assignment could not be withdrawn and that defendant would be held responsible if it paid its account with Davis without written notice from Roloff. Finally, as an exhibit to defendant's counter affidavit, is a list of Moloch's accounts receivable sold at the Auction, which includes the American Casting account, but not the account sued on here. This exhibit suggests the inferences, that since the account of defendant was not listed, the assignment was not unconditional, but given only to secure the American Casting account, though there is an affidavit of Roloff that the assignment was not mere security;^{and} that if Davis paid his account in full with Moloch in June 1938, the list of accounts made the following November would hardly contain, as it does, that account. Plaintiff says here that even if the account was but security, still in buying the main account he bought the underlying security and is in no worse position. There is still the question, however, whether the main account had been paid by Davis. It is plain that triable issues of fact were presented by the affidavits.

The finding that plaintiff was entitled to summary judgment was inconsistent with the finding that he maintained the issues by proper and sufficient evidence. There was no trial of the issues.

It is true that the testimony of Davis was heard and some inconsequential testimony of defendant's president. While the exhibits were before the court in the summary judgment proceeding, they were not introduced as evidence on a trial of the issues, nor were any witnesses presented by plaintiff. Plaintiff was not entitled to a summary judgment and there was no trial of the issues.

The judgment is reversed and the cause remanded for a trial on the issues of fact.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND BURKE, J. CONCUR.

It is true that the feeling of this the heart and soul
 interdependent feeling of dependence, which the
 exists more before the fact is the present feeling of dependence,
 they are not introduced as evidence as a fact of the heart, but
 were not introduced as evidence as a fact of the heart, but
 entitled is a primary judgment and there are no facts of the heart.
 The judgment is reversed and the heart is reversed for a
 trial on the basis of fact.

THE JUDGMENT OF THE HEART AND THE HEART OF THE JUDGMENT

HENRY, J. J. TWO THIRDS, 4. 1911.

42496

JAMES JIRKOVSKY, JR., a minor, by
James Jirkovsky, Sr., his father
and next friend,

Appellee,

v.

JUNICE ELFMAN and BERNARD J. ELFMAN,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

323 I.A. 282²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County in the sum of \$2500 entered on verdicts of the jury against both of the defendants. Motions for directed verdicts as to each defendant were made at the close of the plaintiff's evidence and again at the close of all the evidence. In each case the ruling was reserved but later the motions were overruled. After verdicts, motions were made on behalf of each defendant separately for judgments non obstante or in the alternative for new trials. Before these motions were passed on, and by leave of court, the motions for new trials were withdrawn. The case thus stands on the motions for judgments non obstante as to each defendant and no question as to the weight of the evidence nor as to any question of fact is presented. Defendants' position is that each judgment should either be affirmed or reversed without remandment, as a matter of law.

It is apparent and is recognized by the defendants that in taking this position they are in effect demurring to the evidence and that if there is any evidence which, with its intendments most favorable to the plaintiff, tends to prove the essential elements of his

JAMES J. JIMOVSKI, JR., Plaintiff,
vs.
JAMES J. JIMOVSKI, JR., Defendant.

JAMES J. JIMOVSKI, JR., Plaintiff,
vs.
JAMES J. JIMOVSKI, JR., Defendant.

JAMES J. JIMOVSKI, JR., Plaintiff,
vs.
JAMES J. JIMOVSKI, JR., Defendant.

3821A.282

MR. JAMES J. JIMOVSKI, JR., Plaintiff, vs. MR. JAMES J. JIMOVSKI, JR., Defendant.

This is an appeal from a judgment of the Superior Court

of Cook County in the case of JAMES J. JIMOVSKI, JR., Plaintiff, vs. JAMES J. JIMOVSKI, JR., Defendant.

Against both of the defendants. Judgment for JAMES J. JIMOVSKI, JR., Plaintiff.

To each defendant were made at the close of the plaintiff's evidence and again at the close of all the evidence. In each case the ruling was reversed but later the motions were overruled. After verdict,

motions were made on behalf of each defendant separately for judgment

non obstante or in the alternative for the trial. Before these

motions were denied on, and by leave of court, the motions for new

trials were withdrawn. The case thus stands on the motions for

judgment non obstante as to each defendant and no question as to the

weight of the evidence nor as to any question of fact is presented.

Defendant's position is that each judgment should either be affirmed

or reversed without remand, as a matter of law.

It is argued and is recognized by the defendant that in

making this motion they are in effect denying to the evidence and

that if there is any evidence which, with its inferences most favor-

able to the plaintiff, tends to prove the essential elements of his

case the issues were properly for the jury; and if, on the other hand, the evidence, with all legitimate inferences that may legally and justifiably be drawn therefrom, does not tend to show due care on the part of the plaintiff, then the judgment should be reversed.

Only such facts are stated as are shown by the plaintiff's own testimony and those things not controverted in the record.

It appears from the statements as we have them before us that in June of 1940 the appellant Bernard J. Elfman owned a LaSalle sedan which the police report in evidence shows to have been without mechanical defect immediately after the accident in question. On the evening of June 17th this car was being driven by Mr. Elfman's eighteen year old daughter, the defendant Junice Elfman, in a northerly direction on Pulaski Road near its intersection with Ainslie Street. On the left, or west side of Pulaski Road was a large double garage at 4910 North Pulaski Road, operated by Charles Stelzer, where the car was kept in storage.

On the evening in question Miss Elfman, with the consent of her father, took this car out to attend a baseball game and to take two of her girl friends out for an ice cream soda, and it was while she was returning the car to the garage that the accident in question occurred.

The plaintiff testified that on the night in question he was riding his motorcycle and stopped at a filling station on the southwest corner of Pulaski and Ainslie, which was about a block and a half south of the place where he worked, and that he stopped at the station to get some gas and oil; that he intended to go home, get cleaned up and go out for the evening; that he had owned many motorcycles and had been driving them for seven or eight years; that Pulaski Road is about 50 feet wide, is paved, and has street car tracks on it. He testified he was driving about 12 or 14 miles per

hour in second speed and was riding a foot or two off the street car tracks on the cement pavement; that the Elfman car and one or two other cars were also going north and that he was about 20 feet back of the Elfman car, which was straddling the east rail; that there was at least one car parked on the east curbstone and that on the west side of the street there were buildings, one of which was Stelzer's garage; that he knew the place well and for a good many years had lived across the street from it; that he was only going a few feet farther and turn into a driveway on the east side of the street; that the Elfman car straddled the east rail for a while and then swung over to the right to make a back turn into the garage; when it turned it went to the right and off the tracks and made a sudden stop.

The witness further testified that he was about 20 feet from the car when it stopped; that he was looking straight ahead and saw no sign or signal; when the car stopped its front wheels were maybe a foot or two from the east rail of the northbound street car track and the back wheels about two or two and one-half feet from the car line; that he was then about two feet from the street car track; that he saw a car or two coming south pretty fast so he swung to the right to go through a little space which wasn't big enough and the left side of his motorcycle struck the right rear bumper and fender of the Elfman car, crushing his leg. He said the Elfman car was stopped at a spot where there was a car parked on the east side of the street and there was about 20 inches between them; that his motorcycle was a yard across and he couldn't get through; that when he saw the car stopping he applied the brake; that he was then going 12 or 14 miles an hour; that he had just cleaned up his brakes that same night, that they were pretty good and had new linings; that he did not see the driver of the LaSalle car do anything. He said, "I was looking straight ahead, but I wasn't trying to see who was in the car * * *. I noticed there was a car or two coming south and that she swung over and i didn't

have a chance, I couldn't make it". The plaintiff gave a long account of his injuries, operations, earnings, etc., which are not material here, because the amount of the verdict is not questioned.

On cross-examination plaintiff's testimony was substantially the same except that he elaborated his experience as a motorcycle driver and stated that he had driven a motorcycle at 117 miles an hour on a race track. His testimony was that the Elfman car was travelling at about the same rate of speed as his motorcycle, i.e., twelve to fourteen miles per hour; that he followed it at about 20 feet distance for a little over 200 feet from the filling station to the point of the accident. He also testified that he could see up Pulaski Road and that he could see the car parked on the east curb when he was near the corner of Ainslie, and when he was about 170 feet away; that he had done race riding on motorcycles for seven or eight years and that he belonged to a club which had contests among themselves. Also that at 12 or 14 miles per hour he could stop a motorcycle within 15 to 20 feet. When asked about tail lights on the Elfman car he said, "I didn't notice, I know they have tail lights". He was asked "You knew they were burning didn't you?" He said, "No I did not notice". The next question was, "You did not notice that?" His answer was, "No, I did not."

Evidence for the defendant tends to show that Miss Elfman was proceeding slowly up the street on the east or northbound car line; that she signaled her intention to stop and make a left turn and that she stopped gradually. As stated, the car was equipped with stop lights and the policeman found everything in proper order after the accident.

It is proved and not disputed that at the time and place in question Miss Elfman was on a mission of her own, for her own pleasure and enjoyment and not upon any business or errand for her father, or the family in general.

have a chance, I couldn't make it. The accident gave a long account of his injuries, operations, hospital, etc., which are the material here, because the account of the trial is not considered. On cross-examination (testimony) testimony the witness finally the same point that he had been a witness at the time of the accident and stated that he had been a witness at the time of the accident on a road near. His testimony was that the witness was traveling at about the same rate of speed as his automobile, about twelve to fourteen miles per hour; that he followed it at about 50 feet distance for a little over 200 feet from the accident to the point of the accident. He also testified that he could see up Walnut Road and that he could see the car coming in the road when then he was near the corner of Walnut, and when he was about 150 feet away; that he had been riding in the automobile for some of eight years and that he believed in a high wheel and spoke wheel himself. Also that at 15 or 16 miles per hour he could stop a motorcycle within 15 to 20 feet. When asked how long it took to stop, he said, "I didn't notice, I know they have call signals." He was asked "How long that was running signals?" He said, "No, I did not notice." The next question was, "How did you notice that?" His answer was, "No, I did not."

Evidence for the defendant tends to show that this witness was approaching slowly on the street on the east of Washington and that the witness had intention to stop and make a left turn and that she stopped gradually. It is stated, she was confused with the lights and the witness found everything in proper order after the accident.

It is proved and not disputed that at the time and place in question this witness was on a street at her own, for her own pleasure and enjoyment and not upon any business or errand for her father, or the family in general.

The plaintiff charged that the defendants were guilty of negligence in causing an automobile suddenly to stop preparatory to making a left hand turn in the middle of the block without giving a proper signal. He was following behind the automobile at a distance of about twenty feet and was unable to stop his motorcycle in time to avoid a collision.

In this case we have for decision the question whether there is any evidence tending to prove that plaintiff was in the exercise of due care for his own safety at the time of the accident. That proof is essential. Defendants state their position to be that plaintiff's testimony not only fails to establish due care on his part, but on the contrary shows that he was negligent. They refer to plaintiff's own testimony as to his speed, use of brakes and his failure to notice lights on the car. It is also said that it may be true there was no room between the parked car and the Elfman car for him to get through, yet his own testimony shows that he saw the parked car when he was 170 feet away and at 14 miles per hour could never have been in difficulty.

Plaintiff saw the parked car before he came close to it, and he also saw the Elfman car, and yet tried to pass between them. These facts indicate the plaintiff has failed to prove due care. It appears from his testimony that his motorcycle was equipped with clutch and brake mechanism similar to that of an automobile, and he said he could have stopped within 15 or 20 feet. Yet he did not do so. Having driven his motorcycle into the space which he said was not wide enough, he was responsible for the result of that collision.

It has long been held by this court and our Supreme Court that neither judge nor jury is required to believe the statements of a witness if they are contrary to the general knowledge and experience of mankind, and we venture the opinion that plaintiff's testimony

The plaintiff claims that the defendant was guilty of negligence in causing an automobile accident by the operation of a defective lamp; that in the night of the day without giving a proper signal. The defendant claims the automobile was in line of about twenty feet and was unable to stop in time to avoid a collision.

In this case we have the fact that the defendant another there is any evidence tending to prove that plaintiff was in the exercise of due care for his own safety at the time of the accident. That proof is essential. Undoubtedly it is his duty to be that plaintiff's testimony not only fails to establish the facts on his part, but on the contrary shows that he was negligent. They testify to plaintiff's own testimony as to his speed, use of brakes and his failure to notice lights on his own. It is also said that it may be true there was no room between the vehicle and the other car for him to get around, yet his own testimony shows that he was not alerted and when he was 175 feet away and at 15 miles per hour could never have been in difficulty.

Plaintiff says the witness saw before he came close to it, and he also saw the other car, and yet failed to give warning. These facts indicate the plaintiff has failed to prove his case. It appears from his testimony that his automobile was equipped with lights and brake mechanism similar to that of an automobile, and he said he could have stopped within 15 or 20 feet. Yet he did not do so. Having driven his automobile into the track which he said was not wide enough, he was responsible for the result of that collision.

It has long been held by this court and our Supreme Court that neither judge nor jury is required to believe the statements of a witness if they are contrary to the general knowledge and experience of mankind, and we venture the opinion that plaintiff's testimony

contravenes such knowledge and experience. We are not obliged to believe as judges if we do not believe as men and we doubt if anyone can believe that a motorcycle in the hands of an experienced driver driving at not more than 14 miles per hour could not be stopped or controlled under the circumstances here when the driver is in the exercise of due care.

Defendants have stated that the position they have taken in this case precludes them from arguing the weight of the evidence as to whether or not Miss Elfman gave a signal of her intention to stop and therefore they must take it for granted on this question of law that she stopped without warning. Assuming this to be true it does not in any way help the plaintiff's case, because it was a condition precedent to his recovery that he must first prove himself to have been in the exercise of due care for his own safety.

The general rule applying to the situation here is stated in Berry, Law of Automobiles, 2.524, as follows:

"A motorist has a right to follow another car at a reasonable and safe distance, but it is his duty to use due care to avoid colliding with vehicles in front of him. In trailing another car a motorist must govern his speed and distance so as to allow for the contingency of the car in front suddenly stopping and it has been held that a motorist following another car should proceed at such a speed and distance as will permit him to avoid a collision in the event the forward car may come to a sudden stop, irrespective of whether its driver gives any signal."

The rule thus laid down has been applied almost universally. Zandras v. Moffett, 286 Pa. 477, 133 Atl. 817; 47 A. L. R. 699, cited by defendants, a case in which the court reversed a judgment and directed a judgment for the defendant non obstante veredicto, held:

"It was the duty of the driver to use reasonable care, and so regulate his car as to prevent a rear end collision with the one which was moving in front of him. [citing cases.] Though no special warning was here given by the person in advance, the one in the rear saw that the car had come to a stop, and this was observed while 10 or 15 feet still intervened. He was approaching a street crossing, and was bound to have his vehicle under such command that the same could be brought to a stand at the slightest sign of danger * * *."

[illegible]

in the exercise of the power for his own safety.

precedent to his recovery that he must first prove himself to have been not in any way the originator of the same, and that it was a condition that the accused without exception, leaving him to be free, it does and therefore the act is not treated as the commission of the to threaten or not like him from any kind of his intention to give in this case overruled that the accused was guilty of the offense as

Notwithstanding the fact that the accused was guilty of the offense as

The General Rule applies to the following cases:

in every law of nature, and in every

1. The witness stated that he saw the vehicle involved in the collision on the morning of the accident, and that he saw the vehicle involved in the collision on the morning of the accident, and that he saw the vehicle involved in the collision on the morning of the accident.

[illegible]

as the dominant non-plant taxon

[illegible]

Plaintiff calls to our attention that the accident in the instant case did not occur at the intersection and states that plaintiff was justified in assuming that the automobile would continue at least to the next street intersection. However, though the circumstances in each case cannot be the same, we think the appellate courts of California and Missouri have very well stated the rule to be that the very fact that a driver runs into a car ahead of him affords at least some evidence that he was either following too close or too fast. Our own Supreme Court has pointed out on many occasions that a plaintiff cannot substitute the negligence of another as an excuse for his own failure to exercise due care. Other courts have said that a driver, to be in the exercise of due care, must always be prepared to stop within the range of his assured and visual freedom of action, in other words he must be prepared to stop within whatever distance he is following.

Plaintiff calls to our attention that the statutes of Illinois provide that no person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving a signal to turn right or left, during not less than the last one hundred feet traveled by the vehicle before turning, in the event any other vehicle may be affected by such movement.

Plaintiff reviews the evidence as follows to show that it was a question of fact whether he used due care:

The plaintiff testified that he was about twenty feet back of the Elfman car, which was straddling the east rail. The car swung over to the right of the track to make a turn. The plaintiff did not know at the time of the accident that the automobile was going to make a left turn. He expected to go straight. When the automobile turned to the right off the car tracks it made a sudden stop. The plaintiff was about twenty feet from the car when it stopped and was looking

Witness called to my attention that the accident in
the instant case did not come at the intersection and would
certainly not justify in assuming that the automobile would continue
it back to the next street intersection. However, though the officer
stated in each case that he was not sure, he stated that he was
of California and Missouri have very well known for miles as he that
the very fact that a driver runs into a car ahead of him shows he
loses some evidence that he was either following too close or too fast.
Our own witness Court has pointed out an error in the fact that a witness
cannot substitute the negligence of another as an excuse for his own
failure to exercise due care. Other courts have said that a driver,
to be in the exercise of due care, must always be prepared to stop
within the range of his sound and visual observation of traffic, in other
words he must be prepared to stop within whatever distance he is
following.

Witness called to my attention that the statute of
Illinois provides that no person shall turn a vehicle from a straight
course upon a highway unless and until such movement can be made with
reasonable safety, and then only after giving a signal to turn right
or left, during not less than the last one hundred feet traveled by
the vehicle before turning, in the event any other vehicle may be
affected by such movement.

Witness called to my attention that the witness in Illinois is that
it was a question of fact whether he used his car;
The witness testified that he was about twenty feet back
of the Illinois car, which was approaching the west side. The car swung
over to the right of the road to make a turn. The witness did not
know at the time of the accident that the automobile was going to make
a left turn. He expected to go straight. When the automobile turned
to the right off the car track it made a sudden stop. The witness
was about twenty feet from the car when it stopped and was looking

straight ahead. He saw no sign nor signal given by the driver of the car. When the car stopped he saw a car or two coming south. So he attempted to swing to the right to go through a space between the defendants' car and one parked at the curbstone. There was only a space of about twenty inches between the two cars and not room enough for the motorcycle to drive through. When the plaintiff saw the car stopping, he applied the brake. He was going about twelve or fourteen miles an hour. The brakes had just been cleaned that night and were in good condition.

The plaintiff testified that traveling at fourteen miles an hour he thought the motorcycle might be stopped in fifteen to twenty feet, but that the brakes could not be put on instantly. He further testified that he had never measured the distance within which the motorcycle could be stopped and that he was only making a guess as to the distance.

While it is true the plaintiff testified he did not notice the tail lights on the automobile, it appeared that the street was well lighted and he clearly saw the car and followed it all the way. There was no charge made of a failure to have lights on the automobile and it would not have made any difference anyway because of the fact that the plaintiff actually saw and knew of the presence of the automobile. Plaintiff further testified that he was twenty feet back of the car when it stopped and he turned a little bit to the right. There was but little space between the Elfman car and the parked car. He said he couldn't turn the other way because the other cars were coming too fast against him. These other cars going south were either on the southbound street car track or between the southbound and northbound tracks.

Plaintiff states that there was very little conflict in the evidence; that it must be assumed as true that the defendants failed to give the statutory signal before they stopped the car between the

straight ahead. He saw the car stop and then he saw the driver of the car. When the car stopped he saw a car or two coming south. He attempted to make it the right to go through a space between the defendant's car and the car. There was only a space of about twenty feet between the two cars and not room enough for the motorcycle to drive through. When the plaintiff saw the car stop, he pulled the brake. He was going about twelve or fourteen miles an hour. The brake had just been released that night and was in good condition.

The plaintiff testified that traveling at fourteen miles an hour he thought the motorcycle might be stopped in fifteen to twenty feet, but that the brake could not be put on instantly. He further testified that he had never measured the distance within which the motorcycle could be stopped and that he was only making a guess as to the distance.

While it is true the plaintiff testified he did not notice the tail light on the automobile, it appeared that the street was well lighted and he could see the car and follow it all the way. There was no charge made of a failure to have lights on the automobile and it would not have made any difference anyway because of the fact that the plaintiff actually saw and knew of the presence of the automobile. Plaintiff further testified that he was twenty feet back of the car when it stopped and he turned a little bit to the right. There was but little space between the first car and the parked car. He said he couldn't turn the other way because the other cars were coming too fast against him. These other cars going south were either on the southbound street or back of between the southbound and northbound streets.

Plaintiff states that there was very little conflict in the evidence; that it was assumed as true that the defendant failed to give the statutory signal before they stopped the car between the

street intersections; that there was nothing to put the plaintiff on notice that an abrupt stop would be made; and that it is claimed that the place occupied by him and the speed at which he was driving the motorcycle must under the circumstances be considered reasonable. Plaintiff further states that when the automobile was brought to a sudden and abrupt stop he was confronted with a situation that required instant action and that no other course was open to him than the course he followed; that if he had turned to the left of the defendants' automobile to avoid a collision he might have been killed by a head-on collision with the oncoming southbound cars; and that one cannot question his conduct if he were confused by imminent danger and if others in cool judgment might have taken another course. Plaintiff calls the court's attention to Mahan v. Richardson, et al., 284 Ill. App. 493, in which it was said:

"As has often been stated by our Supreme Court, there is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger, and that the only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances * * *."

The foregoing considerations lead to our opinion that as a matter of law plaintiff did not exercise due care and that accordingly he was not entitled to recover. This conclusion renders unnecessary the decision of any other point. The trial court erred in refusing to enter judgments for the defendants notwithstanding the verdict in plaintiff's favor.

The judgments are therefore reversed and the cause is remanded with directions to enter judgments for the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE AND KILEY, JJ. CONCUR.

the following; that it be not changed or the last of the following:

instead action and that of other owners and also in the case of the
action and action for the and continued with a situation and provided

Plaintiff should state that the action is not a matter of a
dispute, but rather the defendant is considered reasonable.

The above occurred by him and the need is with the delivery and
noted that as stated that would be held; and that it is claimed that
the defendant is not; that there will be no obligation on

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who had recently suffered from a severe earthquake. The President expresses his sympathy for the victims and offers assistance in rebuilding the state.

There was a double of "The" and "The"

The University of Chicago Press

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On the basis of the above, the following conclusions can be drawn:

The Commission is now in the process of reviewing the Commission's findings and recommendations.

42600

ANNA STARCZYNSKI,

Appellee,

v.

ALFRED MILTENBERG,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

323 I.A. 283

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict for plaintiff in the sum of \$8,500. She remitted \$3,500 and judgment was entered for \$5,000. Defendant appeals.

February 22, 1939, plaintiff, about 49 years of age, a dressmaker employed by Mitchell Frocks, boarded the passenger elevator in a 10 story building managed by defendant in Chicago. She entered the elevator at the 7th floor where her employer was located. While descending to the first floor, the elevator, out of the operator's control, slid past the first floor to the spring cushions at the base of the shaft in the basement. Plaintiff claims she was injured as a result of the accident.

The issues made by the pleadings are whether plaintiff's action is barred under Section 29 of the Workmen's Compensation Act; whether defendant was negligent; and whether plaintiff was injured as a result of his negligence.

It is admitted that Mitchell Frocks and defendant were under the Workmen's Compensation Act at the time of the accident. The jury's special verdict was "No." on the question whether, when the accident occurred, plaintiff was in the act of leaving the building for the first time after finishing her work at 4:30 P.M. That verdict is significant for, if justified, its effect was to decide that plaintiff's injuries did not arise out of or in the course of her employment, (Wilson Garment Mfg. Co. Inc. v. Edmonds, 312 Ill. App. 317,) and hence she was not barred in pursuing her common law remedy.

ALAN WILSON, JR.

Defendant,

v.

ALAN WILSON, JR.

Plaintiff.

8511A.288

ALL JUSTICE THAT DELIVERED THE VERDICT OF THE COURT.

This is a personal injury action with respect to plaintiff

in the sum of \$2,500. The verdict is \$2,500 and judgment was entered

for \$2,000. Defendant appeals.

February 22, 1929, Plaintiff, about 40 years of age, a

mechanic, employed by [Name] Bros., located at [Address] elevator

in a 10 story building situated in Chicago. The elevator

the elevator at the 7th floor where the accident was located. While

descending to the first floor, the elevator, out of the operator's

control, slid past the first floor to the sixth floor of the

base of the shaft in the basement. Plaintiff claims he was injured

as a result of the accident.

The issue made by the plaintiff was whether plaintiff's

action is barred under section 10 of the [Name] Corporation

Act; whether defendant was negligent; and whether plaintiff was

injured as a result of his negligence.

It is admitted that [Name] Bros. and defendant were

under the [Name] Corporation Act at the time of the accident.

The jury's verdict was "No," on the question whether, when

the accident occurred, plaintiff was in the act of leaving the

building for the first time after finishing his work at 4:30 P.M.

That verdict is significant for, if justified, its effect was to

decide that plaintiff's injuries did not arise out of or in the

course of his employment, (Wilson v. [Name] Bros., 1929).

312 Ill. App. 217, and hence was not barred in bringing her

common law remedy.

At the trial plaintiff testified she quit work about 4:30 P. M., washed her hands, changed her clothes, punched the clock, descended in the elevator to the first floor, left the building, had a cup of coffee at Walgreen's drug store, returned to the building about 4:40 P.M. ascended in the elevator to the 7th floor to meet Miss Krueger, with whom she had an appointment, and that upon reaching the 7th floor she stepped off the elevator, called to Miss Krueger to board the elevator; that Miss Krueger was left on the 7th floor since there was no room for her; and that in descending on this trip the accident happened. Before the Industrial Board, in an unsuccessful attempt to obtain compensation, plaintiff testified that she was injured about 4:30 P.M. after working hours, and that immediately after she quit work "I went home. I went to dress up to the dressing room and from there I went to the elevator. I went to the elevator after I dressed. I punched my time, went to the elevator and waited there". At the trial she said she was not asked at the Industrial Board whether she had first gone for a cup of coffee. Harriet Krueger testified she had an appointment with plaintiff on the 7th floor; that she worked in another building about 3 doors away; quit at 4:30 P.M. and went direct to the 7th floor of defendant's building about 4:34; that plaintiff came up on the elevator about 4:39 and came toward her and motioned to the witness who was not successful in boarding the elevator. Abraham Sirota, who was the employee involved in the Wilson case, testified that he quit work at 4:30, but it was nearly 5 o'clock before he left his floor as a co-passenger of plaintiff; and that the accident happened about five minutes to five. The elevator operator testified that between 4:35 and 4:40 he took the elevator up to the 7th floor, took four passengers from there, a few from the 6th and the remaining passengers from the 5th floor and, while descending the car slipped and the accident happened. An engineer who was in the basement at the time of the accident testified that the accident happened between 4:40 and 5:00 o'clock.

At the trial plaintiff testified the suit was about 4:30 P. M., reached her home, changed her clothes, reached the clock, descended in the elevator to the first floor, left the building, and a cup of coffee at defendant's drug store, returned to the building about 4:40 P. M., ascended in the elevator to the 7th floor to meet Miss Krueger, with whom she had an appointment, and they then proceeded to the 7th floor and stopped off the elevator, called to the elevator to board the elevator; that Miss Krueger was left on the 7th floor since there was no room for her; and that in descending on this trip the accident happened. Before the Industrial Board, in an unsuccessful attempt to obtain compensation, plaintiff testified that she was injured about 4:50 P. M. after working hours, and that immediately after the accident she went home. I went to sleep in the building and from there I went to the elevator. I went in the elevator after I finished. I reached my time, went to the elevator and waited there. At the trial she was not asked as to Industrial Board whether she had that cup of coffee. Plaintiff Krueger testified she was in defendant's apartment on the 7th floor; that she worked in another building about 7 hours away; left at 4:30 P. M. and went direct to the 7th floor of defendant's building about 4:34; that plaintiff came on the elevator about 4:35 and came toward her and motioned to the witness who was not successful in boarding the elevator. Another witness, who was the employee involved in the Wilson case, testified that he went down at 4:40, but it was nearly 5 o'clock before he left his floor as a co-passenger of plaintiff; and that the accident happened about five minutes to five. The elevator operator testified that between 4:30 and 4:40 he took the elevator up to the 7th floor, took four passengers from there, a few from the 8th and the remaining passengers from the 6th floor and, while descending the car stopped and the accident happened. An engineer who was in the basement at the time of the accident testified that the accident happened between 4:40 and 5:00 o'clock.

This setting of time by the various witnesses does not dispute plaintiff's testimony that she returned to defendant's building, after having had coffee, about 4:40 P.M. This would allow her about ten minutes within which to leave her place of employment about 4:30, descend to the first floor, cross the street from the northeast corner of Jackson and Market street to the southeast corner for coffee and return to the building. It is admitted coffee was served at a drug store on the southeast corner. Plaintiff's testimony at the Industrial Board appears to exclude any possibility of the two elevator trips and from that testimony, the subsequent decision in the Wilson case, and the story at the trial, an inference of fabrication might be drawn. Yet, Miss Krueger's testimony is unimpeached, and the time of the accident set by defendant's witnesses would accommodate plaintiff's story, and we cannot say, though there was but little time for the cup of coffee, that the story is intrinsically untruthful. The testimony at the Industrial Board was for impeachment and was a test for the jury as to plaintiff's credibility. The issue was for the jury and we cannot say its special verdict was against the manifest weight of the evidence.

Defendant says plaintiff relied on the doctrine of res ipsa loquitur and the presumption arising therefrom vanished in the face of evidence that the operator was able and experienced; that the elevator carried an inspection certificate of the City of Chicago and that the repair work was being performed by the best available specialists in the business. He says that evidence shows he did all that any reasonably prudent man would have done. He further says that there is no evidence of overload and that an average group of from 12 to 13 men and women will not exceed 2,000 pounds in weight; and that a capacity load under the certificate of inspection was 2,000 pounds.

This setting of time by the witness is not
 Elmore's testimony that was given in the witness's statement
 after a long time, about 1900. This would allow the
 ten minutes which the leave was given to be about 1900,
 according to the first time, when the street from the witness's house
 of Jackson and Market street to the witness's house for coffee and
 return to the witness. It is admitted that the witness is a drug
 store on the southeast corner. Elmore's testimony at the Industrial
 Board would be evidence any possibility of the two different ways
 and from that testimony, the witness's location is in the same place
 and the story at the trial, an interview of testimony which is given.
 Yet, this witness's testimony is unimpaired, and the time of the
 accident was by witness's statement which is unimpaired.
 story, and we cannot say, though there was not a time for the
 of coffee, that the story is intentionally distorted. The testimony
 at the Industrial Board was for improvement and was a fact for the
 jury as to Elmore's testimony. The issue was for the jury and
 we cannot say the special verdict was against the witness's testimony of
 the witness.

Elmore's testimony is given in the witness's statement
location and the investigation which was made in the time
 of evidence that the witness was in the witness's house; that the
 of evidence carried in the witness's statement of the City of Jackson, and
 that the witness was not being examined by the jury's testimony.
 specialists in the business. He says that witness should be in all
 that any reasonable student would have done. He further says that
 there is no evidence of evidence and that an average person of 1900 is
 to 1900 and would not have 2,000 words in weight; and that
 a specialty found under the evidence of testimony was 2,000 words.

The complaint charged negligence in maintenance, operation and control of the elevator, resulting in lack of control and the consequent falling of the elevator to the basement. Defendant in the operation of the elevator was a common carrier and held to the highest degree of care, and the sliding of the elevator is prima facie evidence of his negligence. Hartford Deposit Co. v. Sollitt, 172 Ill. 222; Springer v. Ford, 189 Ill. 430; Springer v. Schultz, 105 Ill. App. 544. It was defendant's burden to show that he exercised the highest degree of care in the maintenance, operation and control of the elevator in order to prove that he was not negligent. Evidence on this question is that Sirota entered the elevator with about 13 other persons and when the elevator came to the second floor, the operator exclaimed that it was not his fault and the elevator went to the basement where it jumped back after hitting the springs at the bottom of the elevator shaft in the basement; and that a few weeks before it was out of service while being repaired. Defendant testified that on February 5, 1939 the elevator while being adjusted, slipped to the basement as it had on the day of the accident. Plaintiff testified that she knew of only one other occasion when the elevator had gone to the basement. The operator testified that he had a load of 12 persons and that at the second floor the car started to slip and slid gently to the basement, but that later service was resumed and he operated the car continuously until 9 P.M. that night; that the elevator carried a certificate of inspection to carry not over 2,000 pounds, and the usual load was from 10 to 12 people; that he made no adjustment or investigation of the mechanical parts after the accident; and that he had seen the city inspector go over the cables, guides and safety devices. The general contractor testified that the sub-contract for

The complaint charged negligence in maintenance, operation and control of the elevator, resulting in loss of control and the consequent falling of the elevator to the basement. Testimony in the operation of the elevator was a common version and held to the highest degree of care, and the sliding of the elevator in this position of his negligence. Wattford Deposit Co. v. Hollett, 178 Ill. 322; Wagner v. Ford, 189 Ill. 420; Wagner v. Smith, 190 Ill. 607, 344. It was defendant's burden to show that he exercised the highest degree of care in the maintenance, operation and control of the elevator in order to prove that he was not negligent. Evidence in this question is that direct evidence of the elevator with about 12 other persons and when the elevator came to the second floor, the operator exclaimed that it was not his fault and the elevator went to the basement where it jumped back after hitting the springs at the bottom of the elevator shaft in the basement; and that a few weeks before it was out of service while being repaired. Defendant testified that on February 1939 the elevator while being adjusted, slipped to the basement as it had on the day of the accident. Plaintiff testified that she knew of only one other occasion when the elevator had gone to the basement. The operator testified that he had a load of 12 persons and that at the second floor the car started to slip and slid rapidly to the basement, but that later service was resumed and he operated the car continuously until 9 P.M. that night; that the elevator carried a certificate of inspection to carry not over 2,000 pounds, and the usual load was from 10 to 12 people; that he made no adjustment or investigation of the mechanical parts after the accident; and that he had with the city inspector go over the cables, guides and safety device. The general contractor testified that the sub-contractor for

changing the elevator from direct to alternating current, was let to the Otis Elevator Co., but that the work was done under his supervision; that in January and February the passenger elevator was not out of service; that the day of the accident he heard a voice say, "There it goes -" and he heard the noise of the elevator landing; that the elevator had safety controls which automatically braked the elevator from an abnormal speed, so that it came to rest on the cushions with a slight impact; that he was 40 to 60 feet away from the elevator when he heard the noise which was not loud; that there were 12 or 14 people on the elevator; that following the accident he released the safety catches or safety brakes and operated the car up and down to check it, and that the Otis Elevator tested the car with 4,000 pounds of iron and found no slippage; that he thought the car had slipped 3 or 4 weeks before; and that the contract with Otis Elevator included changing the motors governing the elevator controls and wiring.

Defendant did not testify in defense and there is no evidence of any investigation to determine or remove the cause of the slipping following the first event on February 5, nor is there any evidence of any testing of the car then such as was done according to the engineer following the accident. The testimony would indicate that the operator was a man of experience and, according to the contractor, there were safety appliances. Defendant contends there was no evidence of overcrowding or exceeding the weight limit. The responsibility for introducing such evidence was not the plaintiff's; it was defendant's burden to introduce negative evidence. The City Inspector did not testify, no one directly involved in the work on the elevator testified. We believe that defendant did not maintain his burden to show that he used the highest degree of care and we, therefore, cannot say that the jury was not justified in rendering the verdict in favor of plaintiff.

Defendant says no causal connection was shown between the accident and plaintiff's alleged injuries. Plaintiff testified that when the accident happened she was shaken up and became sick; that she

changing the elevator, from direct to alternating current, and in so
the Otis Elevator Co., but that the work was done under his supervision;
that in January and February the elevator was repaired and was not out of
service; that the day of the accident he had a vision, "There
it goes -" and he heard the noise of the elevator falling; that the
elevator had safety controls which automatically prevent the elevator
from an unusual speed, so that it would not fall to the ground with
a slight impact; that he was so sure that the elevator was safe
when he heard the noise which was not loud; that there were 12 or 13
people on the elevator; that following the accident he released the
safety catches or safety brakes and watched the car as it came to
rest; that the Otis Elevator Co. had a record of the number of
of trips and found no abnormality; that he thought the car had stopped
on a lower floor; and that the car landed with some violence against
the floor of the lower story, causing the elevator controls and wiring.
Defendant did not testify in detail in relation to the accident
or any investigation or detection of the cause of the accident
following the first event on February 1, nor is there any evidence of
any testing of the car, from which he was not removed in the accident
following the accident. The testimony would indicate that the accident
was a man of experience and, according to the testimony, there was
safety compliance. Defendant contended there was no evidence of any
violation or exceeding the weight limit. The responsibility for the
lifting such evidence was not the plaintiff; it was defendant's burden
to introduce negative evidence. The City Engineer did not testify, in
the directly involved in the work on the elevator controls. He testified
that defendant did not assist in his function to show that he was the
direct cause of the accident, cannot say that the City
not justified in removing the car from service as a plaintiff.
Defendant says no causal connection was shown between the
elevator and plaintiff's alleged injuries. Plaintiff testifies that
and the accident happened the way shown in the picture and that she

has not worked since, although she was never confined to a hospital; that it is difficult for her to walk and she has suffered pain and discomfort in her back and head since the accident; that in 1936 she was operated on by Dr. Fowler, following which she was all right until the accident; that after the accident she suffered internally; that neither Dr. Remmert, defendant's witness, nor Dr. Hildebrand, her family doctor, would sign the sick benefit certificate for her, but that Dr. Fowler did so; and in March, following the accident, Dr. Fowler said that the accident had broken the incision and there would have to be another operation and that between the accident and the trial she had seen him regularly and had been given pills, salve, etc. Plaintiff's husband testified that prior to the accident her health was good following her operation and she did all the housework, but thereafter "was not fit for anything", sick most of the time and did no housework. Dr. Fowler testified that in 1936, he removed plaintiff's uterus and resected an ovary; that she made a complete recovery and in 1938, her internal organs normal, she was discharged as cured; that in March 1939, when he saw her he found an umbilical and ventral herniae, severe headaches, inability to work, abdominal pains and leg pains; and that ventral and umbilical herniae are usually caused by violence or trauma and that plaintiff's herniae were then of recent origin. Defendant's medical witness testified that he examined plaintiff the day after the accident and found no objective evidence of injury, although she complained of pains in her abdomen, neck, back and legs; that he found no hernia, but had no recollection of examining her abdomen, and that in December 1939, her complaints were the same; that an examination of her abdomen disclosed a surgical scar, but no evidence of herniation. We believe there was ample testimony to prove the causal connection between the accident and plaintiff's injuries. Chicago Union Traction Co. v. May, 221 Ill. 530; Griswold v. Chicago Rys. Co., 253 Ill. App. 498.

has not worked since, although she was never confined to a hospital;
that it is difficult for her to walk and she has suffered pain and
discomfort in her back and head since the accident; that in 1928 she
was operated on by Dr. Fowler, following which she was ill right
until the accident; that after the accident she suffered internally;
that neither Dr. Leeman, defendant's witness, nor Dr. Alderson, her
family doctor, would sign the sick benefit certificate for her,
but that Dr. Fowler did so; and in March, following the accident,
Dr. Fowler said that the accident had broken the ligament and that
would have to be another operation and that between the accident and
the trial she had been his regular and had been given pills, elixir,
etc. Plaintiff's husband testified that when he was in the hospital her
health was poor following her operation and she did not recover,
but thereafter "was not fit for anything," each week of the time she
did no housework. Dr. Fowler testified that in 1929, he removed
plaintiff's uterus and treated an ovary; that she made a complete
recovery and in 1928, her internal organs normal, she was discharged as
cured; that in March 1929, when he saw her he found an enlarged and
ventral hernia, severe headaches, inability to work, abdominal pain
and low back; and that ventral and umbilical hernias are usually
caused by violence or trauma and that plaintiff's hernia were then
of recent origin. Defendant's medical witness testified that he
examined plaintiff the day after the accident and found no objective
evidence of injury, although she complained of pain in her abdomen,
neck, back and legs; that he found no hernia, but had no recollection
of examining her abdomen, and that in December 1929, her complaints
were the same; that on examination of her abdomen disclosed a small
hernia, but no evidence of herniation. He believes there was some prob-
ability to prove the causal connection between the accident and plaintiff's
injuries. Chicago Union Trust Co. v. Ely, 221 Ill. 580; 91-1019.
Chicago Ry. Co., 223 Ill. 494.

Defendant contends that he did not receive a fair trial because of the admission of improper testimony, because plaintiff cried in the presence of the jury and because his attorney was not permitted to examine him after his testimony under section 60 of the Practice Act. During the argument by her counsel, plaintiff cried. Defendant's counsel objected and her counsel then requested that plaintiff leave the courtroom and he apologized to the jury and to the court. Several witnesses testified indefinitely with reference to prior elevator trouble and the evidence was stricken on defendant's motion. There was clear evidence, however, by defendant's witnesses of prior trouble. Dr. Fowler was permitted to testify that plaintiff needed an operation, was subject to repair and was unable to work after the accident. Plaintiff's counsel promised to connect up the testimony, but failed to do so. The court did not strike it and the record does not show that defendant's attorney urged that it be stricken. Defendant was entitled to be examined by his attorney after he was questioned under section 60. Cuban v. Chicago Title and Trust Co., 307 Ill. App. 12. The record shows that plaintiff's earnings were in excess of \$1200 per year prior to the accident and that she had not worked for more than 3½ years thereafter. We believe the judgment entered was reasonable and that defendant was not prejudiced by any of the circumstances of which he complained. The judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

42609

MATTIE JONES,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT

HERMAN H. GOODFRIEND,

COOK COUNTY.

Appellant.

323 I.A. 204

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for plaintiff in the amount of \$1,000. and appeal by defendant who claims he was denied his day in court.

There is no material conflict in the evidence. Plaintiff, tenant of defendant, carrying packages, was ascending the hall stairs to her apartment, when she slipped on loose carpeting and fell backwards down the stairs. Plaintiff said she slipped on a loose, untacked carpet which she had not noticed before. Another tenant had reported the loose carpeting to defendant's housekeeper a week before the accident and noticed the condition was the same three days before the accident. The housekeeper, Mrs. Inez Saunders, testified as plaintiff's witness, that before the accident she had twice observed and reported to defendant's repairman that tacks were missing from the carpet and that the carpeting was loose at the edges.

The issue on appeal revolves about Mrs. Saunders. She was subpoenaed by both parties to appear at 10 A. M. the morning of the trial. After testifying on direct, she was cross-examined by defense counsel and admitted signing a statement to the effect that she had examined the carpeting at the place where plaintiff slipped, and that it was loose at the back of the tread, but not at the edges. In response to a question from the court, she said that she must have told the investigator who took the statement, that the carpet was loose at

MATTIE JONES,

Defendant,

v.

HERMAN H. GOODMAN,

Plaintiff.

THE JUSTICE OF THE PEACE FOR THE COUNTY OF...

This is a personal injury action with verdict and damages...

for plaintiff in the amount of \$1,000, and agreed by defendant who...

alleges he was denied his day in court.

There is no material conflict in the evidence. Plaintiff,

tenant of defendant, carrying messages, was ascending the hall stairs...

to her apartment, when she slipped on loose carpeting and fell...

backward down the stairs. Plaintiff also was injured on a loose...

untreated carpet which she had not noticed before. Another tenant...

had reported the loose carpeting to defendant's housekeeper a week...

before the accident and noticed the condition and the same three days...

before the accident. The housekeeper, Mrs. Inez Henderson, testified...

as plaintiff's witness, that before the accident she had twice observed...

and reported to defendant's wife that there were missing from...

the carpet and that the carpeting was loose at the stairs.

The issue on appeal revolves about Mrs. Henderson. She was...

subpoenaed by both parties to appear at 10 A. M. the morning of the...

trial. After testifying on direct, she was cross-examined by defense...

counsel and admitted signing a statement to the effect that she had...

examined the carpeting at the place where plaintiff slipped, and that...

it was loose at the head of the trail, but not at the stairs. In...

response to a question from the court, she said that she must have told...

the investigator who took the statement, that the carpet was loose at...

the edges, because it was. She was then excused as a witness and was not told by anyone to remain in court or return to testify as a defense witness. At the close of plaintiff's case, Mrs. Saunders was not in court; did not respond to the clerk's call; and defendant's counsel made motions for withdrawal of a juror and continuance, or for the issuance of an attachment so that the witness might be produced to testify for the defendant. The motions were denied. Defendant's sole witness testified to giving Mrs. Saunders a subpoena and the statutory fees.

In his motion for a new trial, defendant complained of the ruling and presented an affidavit of his counsel that the latter desired to call Mrs. Saunders as a defense witness to material matters about which she could testify, to-wit, that none of the tenants had complained to her about the loose condition of the carpeting; that her husband had tacked the carpet down a week before the accident; and that the carpet was not loose at the edges, but only at the rear. The motion was denied.

The motions made at the trial were proper (Mastin v. National Tea Company, 278 Ill. App. 60; City of Chicago v. Powers, 117 Ill. App. 453), and were addressed to the discretion of the trial court. Our inquiry is to determine whether the court abused its discretion. When the motions were made during the trial the court knew that the only advantage defendant could gain from further examination of Mrs. Saunders, was to break down her testimony favorable to plaintiff. This could not be done by presenting her as defendant's witness. She had already been cross-examined upon ~~the~~ written statement, contrary to her testimony on direct examination; there was no showing made ~~by~~ why her further testimony was necessary to prevent prejudice to defendant; and, accordingly, nothing to justify withdrawing a juror and continuing the case. While defendant's counsel had subpoenaed her, he

the edges, because it was. He was then requested as a witness and was not told by anyone to remain in court or return to testify as a defense witness. At the close of Plaintiff's case, Mrs. Sandberg was not in court; did not respond to the clerk's call; and defendant's counsel made motions for withdrawal of a juror and continuance, for the issuance of an attachment so that the witness might be produced to testify for the defendant. The motions were denied. Defendant's sole witness testified to giving Mrs. Sandberg a telephone and the statutory fee.

In his motion for a new trial, defendant complained of the ruling and presented an affidavit of his counsel that the latter desired to call Mrs. Sandberg as a defense witness to material matters about which she could testify, to-wit, that none of the tenants had complained to her about the loose condition of the carpeting; that her husband had taken the carpet down a week before the accident; and that the carpet was not loose at the edges, but only at the center. The motion was denied.

The motions made at the trial were proper (*Wheaton v. Wheaton*, 278 Ill. App. 60; *City of Chicago v. Jones*, 117 Ill. App. 453), and were addressed to the discretion of the trial court. Inquiry is to determine whether the court abused its discretion. When the motions were made during the trial the court knew that the only advantage defendant could gain from further examination of Mrs. Sandberg, was to present her testimony favorable to Plaintiff. This could not be done by presenting her as defendant's witness. She had already been cross-examined upon the written statement, contrary to her testimony on direct examination; there was no showing made why her further testimony was necessary to prevent prejudice to defendant; and, accordingly, nothing to justify withdrawing a juror and continuing the case. While defendant's counsel had proposed to

did not advise the witness to remain or return; she could not be blamed for not knowing she should remain and, accordingly, it was proper to refuse to issue an attachment for her.

Defendant admits, to justify granting his motion for a new trial, he was required to show diligence on his part to have Mrs. Saunders available as a witness and that her testimony was material. Neither the case of Thomas Brass and Iron Works v. Leonard, 91 Ill. App. 599 nor Mastin v. National Tea Company, 278 Ill. App. 60, cited by defendant, support his contention that the trial court abused its discretion. They conform, however, to the general rule. Defendant used diligence in producing the witness (Tilden v. Gardinier, et al, 25-26 [Wendell] N.Y. Com. Law Repts. p. 663), but failed to have the witness instructed, after testifying for plaintiff, to be available for the defense. There is no showing that Mrs. Saunders' further testimony is material to defendant's case, (Chicago & Gt. Eastern Ill. R. R. v. Vosburgh, 45 Ill. 311; 39 Amer. Juris. p. 56); or that it would affect the verdict (Poznanski v. Szezech, 71 Ill. App. 670). On the contrary, we point out that Mrs. Saunders testified on direct for plaintiff that she observed and reported the condition, so that it was not necessary that she testify that no tenant had told her of it; her husband could have testified that he tacked the carpet down a week before, though she testified that the carpet was loose 5 days before the accident; and she had already testified under cross-examination to signing the statement that the carpet was not loose at the edges but at the rear of the tread. Any further questioning upon this contrariety should have been in cross-examination.

In our opinion the court did not abuse its discretion in denying the several motions and the judgment is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

did not advise the witness to remain or follow; but could not be placed
for not knowing she should remain and, consequently, it was deemed to
release the issue in accordance with law.

Defendant's exhibit, to justify carrying the witness to a
trial, he was required to show diligence in the facts related.
Exhibits available as a witness and that the defendant was required,
within the case of Thomas v. Jones, 21 Ill. 407,
500 was Martin v. Bell, 111 Ill. 407, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In our opinion the court did not make the decision in
favor of the several sections and the judgment is affirmed.

JUDGMENT AFFIRMED

WILLIAM J. CONNELLEY, J. CLERK

42356

SAM PANITCH,
Appellee,

v.

YELLOW CAB COMPANY, a
corporation,
Defendant,

CLARENCE CROSS, INC., a
corporation,
Defendant.

—
YELLOW CAB COMPANY, a
corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

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328 I.A. 284²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In the early afternoon of October 29, 1940, a clear dry day, Sam Panitch was riding as a passenger in the rear seat of a Chevrolet automobile being driven in a southerly direction along LaSalle street by the owner, Joseph Brownstein. Morris Grofman, another passenger, was seated beside Brownstein in the front seat. An alley cuts across LaSalle street at the south end of the 33 North LaSalle Street Building and at the north end of the LaSalle Hotel on the opposite side of the street, about midway between Madison and Washington streets. As they approached this alley a truck, weighing over 4,000 pounds, owned by Clarence Cross, Inc., and being driven in a northerly direction along LaSalle street, swerved over to the west side of the street and collided head-on with Brownstein's car, throwing plaintiff from the rear seat and injuring him. He brought suit against Cross, Inc., and the Yellow Cab Company, on the theory that the negligence of both defendants proximately caused the collision. Trial by jury resulted in a verdict against the Yellow Cab Company for \$3,000, and one of not guilty as to Cross, Inc. After overruling the cab company's motions for judgment non obstante veredicto and for a new trial, the court entered judgments on the respective verdicts, from which

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no other thing to be done

the cab company appeals. Plaintiff has filed notice of cross-appeal as to defendant Cross, Inc.

There was no disagreement among the five witnesses who testified on behalf of the respective parties as to the time and place of the accident, the weather, the injury to plaintiff, and the fact that a Brink's Express truck was double-parked on the east side of LaSalle street about four to eight feet north of the alley, facing north and clearing the east rail of the northbound street-car tracks about one to two feet. All testimony pertaining to the manner in which the accident occurred is irreconcilably conflicting, not only between witnesses of the opposing parties, but also between the two eyewitnesses for plaintiff.

The respective defenses interposed appear from a brief summary of the evidence adduced upon the hearing. Charles E. Brisolara, Jr., testified that he was driving the Yellow Cab in a northerly direction, straddling the east or northbound street-car tracks on LaSalle street toward Washington street, for the purpose of discharging a passenger at his destination at the entrance of the 33 North LaSalle Street Building, and that about the time he was passing the alley or just as he passed it, at the rate of ten to twelve miles per hour, the Cross truck came up from the rear and in passing to the left of his taxicab, struck the left rear fender of the cab, swerved diagonally to the left and ran head-on into the southbound automobile that was approaching the alley on the west side of the street. He stated that he at no time saw the truck before it struck his fender, and that he did not deviate from his course along the east side of the northbound street-car tracks, except about six inches, for the purpose of clearing the Brink's Express truck parked just north of the alley.

Brownstein corroborates Brisolara's testimony in all

essential respects except as to the Yellow cab's rate of speed. He stated that as the cab came north on LaSalle street it was in front of the Cross truck, "maybe twenty feet or perhaps a little more. *** There were no vehicles other than the Yellow and the truck going with them at that time. I was traveling south on LaSalle Street, and as I got to about, I should say, maybe ten or fifteen feet from the alley, where the LaSalle Hotel is, I noticed these two cars coming down the street, one behind another, that is, the Yellow in front and this truck in back, and the truck swerved from the rear of the Yellow to the left. The truck was passing to the west. And as I saw them coming, I applied my brakes and stood firm there and stopped right there, and he run right square into me. The front part of his truck struck the front part of mine. I was standing when I was hit. *** The truck, when it struck me, was on the west side of the street going north." When asked whether the truck driver sounded his horn or gave any warning before turning over to the wrong side of the street, Brownstein answered, "No warning at all."

Brisolara's and Brownstein's testimony as to the occurrence was corroborated by one Andrew Abata, also a chauffeur for the Yellow Cab Company, whose car was parked at a Yellow cab stand on the east side of LaSalle street. Abata was talking to another cab driver in front of the LaSalle Hotel and witnessed the collision. He testified that Brisolara's cab was traveling ten to fifteen miles an hour, and as he approached the alleyway and just a little north thereof, the Cross truck was coming by the Yellow cab at a rate of twenty to twenty-five miles an hour, trying to pass the cab. In so doing, the truck's right front fender hit the left rear fender of the cab; then the truck proceeded in a diagonal direction toward the west side of the street, where it collided head-on with Brownstein's automobile.

Grofman, who was sitting in the front seat with Brownstein, gives an entirely different version of the accident. He testified that he first saw the Yellow cab and the Cross truck south of Madison street, approximately a block away, "both coming in the same direction, neck and neck. The truck was west and the Yellow Cab was east. They were traveling close together. They were almost touching each other. I would say they were traveling between thirty and thirty-five miles an hour from the time I first saw them until the occurrence took place. Neither of them passed the other at any time before the accident, and before the truck came over on our side they were racing neck and neck until they were near us, and then the Yellow Cab swerved in front of the truck, and the truck swerved right straight into us." His testimony is not supported by any other witness, and varies radically from Brownstein's, who was sitting beside him.

The testimony of Clarence B. Cross, who was the sole witness for Cross, Inc., differed radically from that of all the other witnesses. He denied that the Yellow cab was traveling in front of him along LaSalle street, and stated that he first saw the taxicab when he was crossing the alley, northbound on the east street-car tracks and about four to five feet from the north line of the alley. It was at that moment he caught his "first glimpse" of the taxi as it "cut directly into me" from the right side of the street at an angle of about 45 degrees and struck the right front fender of the truck, thereby throwing or pushing the truck over to the southbound car tracks, where it collided with the automobile in which plaintiff was riding. Cross's testimony is not supported by any other witness, and is at variance with the testimony of the Yellow cab driver, Brownstein, Grofman and Abata.

The record does not disclose the distance from the Brink's Express truck to the entrance of the 33 North LaSalle Street

Building, but it was undisputedly parked at the south end of that building, only a very short distance from the entrance where Brisolara intended to stop. Under the circumstances it is difficult to believe that the Yellow Cab driver, knowing that he was to discharge a passenger at the entrance of the building only a few feet away, would have been racing down LaSalle street at the rate of thirty-five miles an hour, neck and neck with the Cross truck, as Grofman testified. However, upon the state of the evidence hereinbefore briefly summarized, the jury returned a verdict of not guilty as to defendant Cross, Inc., thus refuting the testimony of both Brisolara and Abata.

The Yellow Cab Company argues, inter alia, that the court erred in denying its motion for judgment non obstante veredicto and in refusing to enter judgment in its favor. Such a ruling would have violated the well settled principle that where there is any evidence, taken in its aspect most favorable to the plaintiff, tending to substantiate plaintiff's case, the cause must be submitted to the jury. However, upon careful examination of the record, we have reached the conclusion that both verdicts were contrary to the manifest weight of the evidence, and that justice will be better served by another trial.

There is considerable force to the argument of the cab company that the conduct of plaintiff's counsel influenced the verdicts returned by the jury, but since the cause will have to be retried for the other reasons indicated, we refrain from discussing that question.

Accordingly, both judgments of the Superior court are reversed, and the cause is remanded for another trial.

JUDGMENTS REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Scanlan and Sullivan, JJ., concur.

... it is not necessarily correct at the time and in
that position, only a very short distance from the entrance
where the building is located. Under the circumstances it
is difficult to believe that the police can deliver, knowing
that we are to deliver a message at the entrance of the
building only a few feet away, and that we have been waiting
outside the door at the rate of thirty-five miles an hour,
and that we are still the same time, in the same position.
However, upon the basis of the evidence, the police are
convinced, the jury returned a verdict of not guilty as to
defendant Brown, and, upon the basis of the evidence of both
defendants and Brown.

The father and company, Brown, and the
company were in the building at the time the defendant was
arrested and in relation to the evidence as to the fact, and
a trial would have resulted in the same result. The
fact that there is any evidence, other than the fact that the
to the plaintiff, showing that the defendant was in the
the case was not admitted to the jury. However, upon the
examination of the record, we have reached the conclusion that
both verdicts were correct in the matter of the fact.
And, that the fact that the defendant was in the building
there is no doubt that the defendant was in the building at the
company that the defendant was in the building at the time the
verdict was returned at the fact, and that the jury will have to
be satisfied that the other evidence is correct, and that the
defendant was in the building.

Accordingly, both judgments of the superior court are
reversed, and the case is remanded for a new trial.

THE COURT: I have read the opinion of the court.
The case is remanded for a new trial.

SCHOLAR AND ATTORNEY, J. J. SCHOLAR.

42670

EDWARD BORKSTROM,
Appellant,

v.

SOUTH SHORE GARAGES, INC.,
Appellee.

35
APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

323 I.A. 235

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

While riding his bicycle in a westerly direction on the north side of 54th place, a few feet east of Harper avenue, on the evening of March 17, 1941, plaintiff, a janitor, 68 years of age, was struck and injured by defendant's automobile, which had been proceeding in a southerly direction on Harper avenue and turned sharply to the left into 54th place. Plaintiff's suit for damages was tried by a jury and resulted in a verdict in his favor for \$1,000, from which he appeals, primarily because the award of damages was grossly inadequate.

Although defendant argues that the jury should have returned a verdict in its favor, it filed no cross-appeal and is apparently satisfied with the judgment, because it asks for an affirmance thereof. Therefore it will be unnecessary to discuss the question of liability, which was determined by the verdict finding defendant guilty.

Following the accident about 9:30 in the evening, plaintiff was taken to the Illinois Central Hospital, where he remained twelve days, until March 29. X-rays of his left leg and skull, which were subsequently admitted in evidence, showed two oblique fractures of the lower left tibia, as well as a transverse fracture of the fibula, and a skull fracture running from approximately the center of the forehead down into the orbit of the eyes. Dr. William Culpepper, a specialist in roentgenology and roentgentherapy, testified that the X-rays showed a linear fracture through the frontal bone of the skull about two and one-half inches long, involving the sphenoid bone, which is the roof

or orbit of the right eye, up into the frontal sinuses, and also disclosed a stellate fracture of the left leg extending two inches from the articular surface of the left tibia inward to the cortex about three inches in length, as well as a transverse fracture of the fibula.

Dr. Lawrence Benjamin attended plaintiff immediately after the accident. He applied a splint to the left leg, and a week later put on a plaster cast. He took care of plaintiff during the time he was in the hospital and then continued treatments at plaintiff's home until May 27. Thereafter plaintiff came to the physician's office for massage and heat treatments. Upon trial Dr. Benjamin testified that he found three fractures of the left leg, as well as a fracture of the skull.

Dr. E. Blake Wright examined plaintiff April 12, 1942, more than a year after he had returned to his home from the hospital, and testified that he found some muscle atrophy in the left thigh and calf, also a few scars around the axilla on the left side and the chest. According to Dr. Wright's notes, the calf of plaintiff's left leg measured one-half inch less in circumference than the right, and the left thigh showed a like discrepancy. He also found a slight lateral movement at the knee joint, which he described as being not a normal condition. He also stated that plaintiff complained of his inability to hear or smell; that the hearing difficulty might be attributed to plaintiff's age, but that his age would not account for the deficiency in his sense of smell.

Plaintiff testified in his own behalf that he was forced to remain out of work four months after the accident, during which period he received no pay. His earnings before the accident were \$130 a month. He was unable to do any heavy work when he finally resumed his janitorial duties and had to hire a helper to whom he paid \$80 to \$100. At the time of the trial

The amount of the loan is \$100,000.00 and the interest is 6% per annum. The loan is to be repaid in 10 equal annual installments of \$10,000.00 each, beginning on the first day of January, 1921. The first installment is to be paid to the United States Treasury Department. The balance of the loan is to be paid to the Federal Reserve Bank of New York. The loan is to be secured by a first mortgage on the property of the borrower. The borrower is to execute a promissory note in favor of the United States Treasury Department. The loan is to be made subject to the approval of the Federal Reserve Board. The loan is to be made for the purpose of financing the construction of the proposed highway.

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the following: in the case of a...

At first, I was in the office of the
on the 1st of April, 1914, and I was
which I had received no pay. The
went with me to a bank. The
when the 1st of April, 1914, and I was
a letter to me on the 1st of April, 1914.

he still had to be assisted by the helper with the heavy work. He stated that his leg was still very weak, and that his hearing and sense of smell continued to be impaired since the accident.

Plaintiff's hospital bill amounted to \$71.20. He paid Dr. Benjamin \$198. According to the evidence, his loss of earnings for four months, at \$130 a month, aggregated \$520, and he paid a helper \$80. Thus, his medical expenses and salary loss totaled \$869.20. The difference between the \$1,000 verdict and judgment, and the amount necessarily expended by plaintiff as a result of the accident, was approximately \$130, which seems to us grossly inadequate, considering the nature of his injuries, which included a fractured skull, three fractures of the left leg, atrophy of the thigh and calf, excess lateral movement of the left knee joint, and an impairment of his sense of smell, to say nothing of the pain, suffering and impairment of his capacity to work up to the time of the trial and probably thereafter.

Defendant argues that the reviewing court will not set aside a verdict for plaintiff on the ground that the damages assessed are inadequate where the plaintiff is not entitled to recover, and its counsel suggested on oral argument that the jury probably returned a sympathetic verdict because of the questionable guilt of defendant. However, upon the record presented, we must assume that the finding of the jury is proper as to defendant's guilt, since, as heretofore stated, it filed no cross-appeal, and asks that the judgment be affirmed. We recently had occasion to consider an inadequate verdict in Luner v. Gelles, 314 Ill. App. 659, wherein plaintiff suffered a leg injury and was incapacitated for about two months, for which the jury awarded him \$375. His actual expenses amounted to \$183.90, and loss of wages aggregated some \$190. The court denied a motion for a new trial. On appeal we reversed the

judgment with the following observation: "It is obvious that the jury either found the defendant guilty and disregarded the proper elements of damages to which plaintiff was entitled, or made a compromise between questionable guilt on the part of the defendant and actual expenditures on the part of the plaintiff," and held that the motion for a new trial should have been sustained.

In Montgomery v. Simon, 309 Ill. App. 516, plaintiff, 55 years of age, was seriously injured in an automobile accident. The evidence showed pecuniary expenses of some \$1,700. The jury returned a verdict of \$2,000, leaving a balance slightly over \$300 as compensation for permanent injuries, past and future pain and suffering. In that case the court also denied plaintiff's motion for a new trial. Upon reversal it was pointed out that at common law, new trials were not allowed upon the ground that the damages allowed by the jury were insufficient, and quoting from Kilmer v. Parrish, 144 Ill. App. 270,^{we} said: "'But the modern rule is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. [Citing cases.] A verdict for a grossly inadequate amount stands on no higher ground on legal principles than a verdict for an excessive or extravagant amount.'" Upon careful consideration of the evidence pertaining to ^{the} injuries sustained by plaintiff, some of which may have a permanent effect, and the actual expenses incurred by him as a direct result of the accident, we are impelled to hold that the damages awarded plaintiff were so grossly inadequate, unfair and unreasonable that the court should have granted a new trial.

For the reasons indicated, the judgment of the Superior court is reversed, and the cause is remanded for another trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR ANOTHER TRIAL.

Scanlan and Sullivan, JJ., concur.

and help that the writer for a long time has been

In the case of the United States v. [redacted], the court held that the defendant's actions were not justified by the circumstances. The court found that the defendant's actions were not justified by the circumstances. The court found that the defendant's actions were not justified by the circumstances.

42699

HAROLD C. MOIST,
Appellee,

v.

PAUL F. JONES, Director
of Insurance of Illinois,
Appellant.

36
APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

323 I.A. 286

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Paul F. Jones, Director of Insurance of Illinois, appeals from an order or decree of the Superior court entered in two proceedings brought in that court under section 13 of "An Act to provide for the licensing of insurance agents," etc., approved January 21, 1936 (Ill. Rev. Stat. 1941, ch. 73, pars. 587-612). In the first proceeding plaintiff filed a petition for review of an order of the Director of Insurance dated November 10, 1941, purporting to revoke a broker's license issued to petitioner under the foregoing statute; this petition was filed as No. 41-S-18299. The second proceeding is a petition for review of an order of the Director of Insurance refusing to issue a broker's license to petitioner for the year beginning March 1, 1942 and purporting to find that petitioner was ineligible to hold such a license; that case was filed as No. 42-S-5722. The two causes were consolidated for trial, and upon hearing, the court reversed both orders of the Director of Insurance, and directed that he issue to petitioner an insurance broker's license for the year commencing March 1, 1942.

The record discloses that on March 23, 1942 petitioner, at his own instance, of his own volition and upon his own motion, obtained an order dismissing the first proceeding and thereafter, on April 21, 1942, upon his own motion prevailed upon the court to vacate the order of dismissal. Respondent thereupon, "specially appearing for the sole purpose" of his

4-239

WILLIAM J. MOYER, JR.
Applicant

WILLIAM J. MOYER, JR.
of Lawrenceville, Georgia
Applicant

82-1420

1. 1942.

The record discloses that in January, 1942, Petitioner, at his own instance, on his own volition and upon his own motion, obtained an order appointing the first proceeding and thereafter, on April 11, 1942, upon his own motion revealed to the court to vacate the order of dismissal. Respondent, respectively appearing for the sole purpose of his defense, in January, 1942, was arrested and taken to the Federal House of Detention in Atlanta, Georgia, where he remained until January 11, 1942, when he was released. The record further discloses that on January 11, 1942, Petitioner was released from the Federal House of Detention in Atlanta, Georgia, and was taken to the Federal House of Detention in Atlanta, Georgia, where he remained until January 11, 1942, when he was released. The record further discloses that on January 11, 1942, Petitioner was released from the Federal House of Detention in Atlanta, Georgia, and was taken to the Federal House of Detention in Atlanta, Georgia, where he remained until January 11, 1942, when he was released.

2. 1943.

The record discloses that in January, 1943, Petitioner, at his own instance, on his own volition and upon his own motion, obtained an order appointing the first proceeding and thereafter, on April 11, 1943, upon his own motion revealed to the court to vacate the order of dismissal. Respondent, respectively appearing for the sole purpose of his defense, in January, 1943, was arrested and taken to the Federal House of Detention in Atlanta, Georgia, where he remained until January 11, 1943, when he was released. The record further discloses that on January 11, 1943, Petitioner was released from the Federal House of Detention in Atlanta, Georgia, and was taken to the Federal House of Detention in Atlanta, Georgia, where he remained until January 11, 1943, when he was released.

motion, moved the court to vacate the order reinstating the cause and setting aside the previous order of dismissal on the ground that the court had no jurisdiction to set aside the dismissal, that the court erred in setting it aside and that the order was contrary to law. April 25, 1942 petitioner filed the second proceeding to compel the respondent to issue to him a license for the year commencing March 1, 1942. An order consolidating the two causes was then entered, following which respondent appeared specially for the sole purpose of his motion, and moved to vacate the order of consolidation on the ground that it would improperly deprive him of the opportunity to contest the second suit on the merits without appearing in the first, which had been voluntarily dismissed by the court on petitioner's motion, and with respect to which action respondent contended the court had no jurisdiction. The court denied the motion for severance and also for vacation of the order of consolidation. Respondent took no further steps in the suit and did not participate in the trial thereof.

No controversy arises upon the facts. The principal question presented is whether the court had jurisdiction to vacate the order of voluntary dismissal. Under the rule existing prior to the enactment of the Civil Practice Act, the court had no jurisdiction to vacate a judgment or order of voluntary dismissal. It was so held in Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, wherein the court stated the reason for the rule as follows: "If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit he must be held to have anticipated the effect and necessary results of this action and should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew." It is true the court held that defendant had

[illegible]

waived its right to object to the reinstatement of the cause because it had voluntarily appeared and participated in the trial; but in the case at bar respondent appeared under a special and limited appearance to object to the order and thus preserved his right to challenge the jurisdiction of the court.

It is urged, however, that since the enactment of the Civil Practice act and under section 50 (7) thereof (Ill. Rev. Stat. 1941, ch. 110, par. 174), the rule at common law no longer prevails. That section of the statute provides that "The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." Counsel's argument that section 50 purported to change the common law rule is not supported by any authority, and we do not think that the section relied upon was intended to cover the circumstances here presented or to alter the rule prevailing under the common law. Moreover, petitioner's motion for reinstatement of the cause was oral and no "good cause" was shown by affidavit or otherwise for setting aside the order or judgment of dismissal.

With respect to the second cause wherein petitioner sought a review of an order of the Director of Insurance refusing to issue a broker's license to him for the year beginning March 1, 1942, respondent interposed no defense because it was his contention that the court had no jurisdiction of the first proceeding and therefore no right to consolidate the two causes. We think the order of consolidation was improvidently issued, but no cases are cited and we know of none which would preclude petitioner from proceeding with the second cause, giving respondent the right to plead and interpose such defense as he may have.

Accordingly, the order is reversed as to the first cause, and as to the second cause, the order is reversed and the cause

-4-

remanded, with directions that a hearing be had on the merits and for such further proceedings as may be necessary.

ORDER IN FIRST CAUSE REVERSED;
ORDER IN SECOND CAUSE REVERSED
AND CAUSE REMANDED WITH DIRECTIONS.

Seanlan and Sullivan, JJ., concur.

remained, with intention that a hearing be had on the merits
and for such further proceedings as may be necessary.

WITNESSES:
JAMES M. KELLY, Clerk of Court,
and JOHN J. KELLY, Attorney at Law,
for the Plaintiff.

WITNESSES:
JAMES M. KELLY, Clerk of Court,
and JOHN J. KELLY, Attorney at Law,
for the Defendant.

42489

NATHAN KATZIN and EDNA L. WEISS,
Appellants,

v.

NABCO LIQUIDATING COMPANY, a corporation;
N. B. I. CORPORATION, a corporation;
NATIONAL BOND & INVESTMENT COMPANY OF
INDIANA, INC., a corporation; NATIONAL
BOND & INVESTMENT COMPANY, INC., a
corporation; NATIONAL BOND & INVESTMENT
COMPANY, a corporation; MONARCH AGENCY,
INC., a corporation; LOAN CORPORATION,
a corporation; FIRST LOAN COMPANY, a
corporation; COMMERCIAL CREDIT COMPANY,
a corporation; BEATRICE ROTHSCHILD,
individually and as executrix of the
last will and testament of Melville
Rothschild, deceased; MELVILLE ROTH-
SCHILD, JR.; A. FRANK ROTHSCHILD;
NANCY MORRIS ROTHSCHILD; SUSAN ROTH-
SCHILD; LEE FRANK; MERWYN FRANK; WALTER
FRANK, and DAVID B. STERN,
Appellees.

37
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3231.A. 236²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order sustaining defendants' motions to strike the amended complaint and dismissing the complaint for want of equity.

The amended complaint, including the exhibits attached thereto, is a lengthy pleading. Briefly stated, it alleges that defendant Nabco Liquidating Company is a Delaware corporation but that its principal office and place of business is in Chicago; that defendants N. B. I. Corporation, National Bond & Investment Company of Indiana, Inc., National Bond & Investment Company, Inc., National Bond & Investment Company, Monarch Agency, Inc., Loan Corporation, and First Loan Company are wholly owned subsidiaries of Nabco Liquidating Company; that in August, 1936, Melville N. Rothschild, now deceased, owned ninety per cent of the stock of Nabco Liquidating Company (hereinafter also designated as Nabco) and defendant Lee Frank then owned ten per cent; that as a result of a change in the capital structure Rothschild and Frank became the owners of 612,200 shares of common stock, which was all of the common stock out-

NATHAN KATZIN and EDNA L. KATZIN
Appellants,

v.

MARCO LIQUIDATING COMPANY, a corporation;
N. B. I. CORPORATION, a corporation;
NATIONAL BOND & INVESTMENT COMPANY OF
INDIANA, INC., a corporation; NATIONAL
BOND & INVESTMENT COMPANY, INC., a
corporation; NATIONAL BOND & INVESTMENT
COMPANY, a corporation; NATIONAL AGENCY,
INC., a corporation; LOAN CORPORATION,
a corporation; FIRST LOAN COMPANY, a
corporation; COMMERCE CREDIT COMPANY,
a corporation; BETHLEHEM CORPORATION,
individually and as executor of the
last will and testament of Melville
Rothschild, deceased; MELVILLE ROTH-
SCHILD, JR.; A. FRANK ROTHSCCHILD;
MELVILLE ROTHSCCHILD; FRANK ROTH-
SCHILD; BEN ROTH; FRANK ROTH; ARTHUR
FRANK, and DAVID S. ROTH,
Appellees.

APPEAL FROM
CIRCUIT COURT,
JOHN COUNTY.

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order sustaining defendants' motions to strike the amended complaint and dismissing the complaint for want of equity.

The amended complaint, including the exhibits attached thereto, is a lengthy pleading. Briefly stated, it alleges that defendant Marco Liquidating Company is a Delaware corporation but that its principal office and place of business is in Chicago; that defendants N. B. I. Corporation, National Bond & Investment Company of Indiana, Inc., National Bond & Investment Company, Inc., National Bond & Investment Company, Monarch Agency, Inc., Loan Corporation, and First Loan Company are wholly owned subsidiaries of Marco Liquidating Company; that in August, 1936, Melville R. Rothschild, now deceased, owned ninety per cent of the stock of Marco Liquidating Company (hereinafter also designated as Marco) and defendant Lee Frank then owned ten per cent; that as a result of a change in the capital structure Rothschild and Frank became the owners of 612,200 shares of common stock, which was all of the common stock of-

standing; that plaintiff Katzin has owned 200 shares of the common stock since October 6, 1936, and plaintiff Weiss has owned 50 shares of that stock since November 20, 1936; that until October 31, 1941, Nabco and its subsidiaries conducted business from fifty-one offices, located in twenty states; that the business of Nabco and its subsidiaries was principally the purchase from automobile dealers of secured notes and other obligations arising in connection with the sale of new and used automobiles, and the financing of wholesale purchases of automobiles by dealers; that defendants Lee Frank, Melville Rothschild, Jr., A. Frank Rothschild and Walter Frank have been directors of Nabco since 1936; that defendant Stern was a director from 1936 until October, 1941; that on July 17, 1941, Melville N. Rothschild died; that his widow, defendant Beatrice Rothschild, individually and as executrix of his estate, and Melville Rothschild, Jr., A. Frank Rothschild, Nancy Morris Rothschild and Susan Rothschild, members of his family, individually and as beneficiaries under various trusts, owned or controlled stock aggregating 398,750 shares, and the common stock holdings of Lee Frank, Merwyn Frank and Walter Frank, all related to the decedent, aggregated 20,850 shares; that the directors of Nabco were all controlled and directed in their actions as directors by the Rothschilds and the Franks; that under the charter of Nabco and the laws of Delaware any sale of the entire assets of the corporation was required to be approved by the affirmative vote of the holders of a majority of the outstanding shares of stock of the corporation; that, for certain selfish reasons, the Rothschilds and Franks conspired to effect a quick sale of all of the assets of Nabco and its subsidiaries during 1941, and during October, 1941, they caused the directors of Nabco to submit to the stockholders thereof a proposed sale of all of the assets thereof to Commercial Credit Company, defendant, and they and the directors caused a meeting to be held of the

standing; that Plaintiff herein has owned 200 shares of the common stock since October 6, 1936, and Plaintiff also has owned 50 shares of first stock since November 20, 1936; that until October 31, 1941, Nabco and its subsidiaries conducted business from fifty-one offices, located in twenty states; that the business of Nabco and its subsidiaries was principally the purchase from automobile dealers of second notes and other obligations arising in connection with the sale of new and used automobiles, and the financing of wholesale purchases of automobiles by dealers; that defendant Lee Frank, Melville Rothschilde, Jr., A. Frank Rothschilde and Walter Frank have been directors of Nabco since 1936; that defendant Stern was a director from 1936 until October, 1941; that on July 17, 1941, Melville N. Rothschilde died; that his widow, defendant Beatrice Rothschilde, individually and as executrix of his estate, and Melville Rothschilde, Jr., A. Frank Rothschilde, Melville Rothschilde and Susan Rothschilde, members of his family, individually and as beneficiaries under various trusts, owned or controlled stock aggregating 398,750 shares, and the common stock holdings of Lee Frank, Melville Rothschilde and Walter Frank, all related to the decedent, aggregated 20,850 shares; that the directors of Nabco were all controlled and directed in their actions as directors by the Rothschilds and the Franks; that under the charter of Nabco and the laws of Delaware any sale of the entire assets of the corporation was required to be approved by the affirmative vote of the holders of a majority of the outstanding shares of stock of the corporation; that, for certain selfish reasons, the Rothschilds and Franks conspired to effect a quick sale of all of the assets of Nabco and its subsidiaries during 1941, and during October, 1941, they caused the directors of Nabco to submit to the stockholders thereof a proposed sale of all of the assets thereof to Commercial Credit Company, defendant, and they and the directors caused a meeting to be held of the

stockholders of Nabco for the purpose of approving a sale of its assets to Commercial Credit Company; that said Rothschilds and Franks, because of their aggregate shares, were able to control any meeting of stockholders; that at a meeting of the stockholders held for the purpose of considering the proposed sale of the assets thereof to Commercial Credit Company they approved the making of a contract of sale. The contract is made a part of the complaint as an exhibit, and it and certain exhibits attached to it take up forty-six pages of the additional abstract. The following is the all important allegation in the amended complaint: "The sale price fixed in said contract of sale is at least \$10,000,000 less than the fair value of the assets sold thereunder." The complaint further alleges that as a result of the sale the profits realized thereon by the Rothschilds and Franks will be taxable, for federal income tax purposes, not at the normal tax and surtax rates fixed by the United States Revenue Laws, but at fifteen per cent of the amounts of such profits; that plaintiffs and the remaining stockholders have sustained a loss through the said sale of the assets at a grossly inadequate price, that said sale works a fraud upon the stockholders of Nabco, other than the Rothschilds and Franks, and that the contract ought to be declared of no legal effect. The prayer for relief seeks a rescission of the contract with Commercial Credit Company, or, in the alternative, enforcement of liability personally against the Rothschilds, the Franks, and the directors of Nabco for the loss occasioned to the minority stockholders, including plaintiffs, through said sale.

Defendants' motions to dismiss the amended complaint were sustained and an order was entered dismissing the amended complaint, from which order the instant appeal is prosecuted.

Defendants have filed in this court a motion in the nature of a plea of release of errors. By this plea and the affidavit and exhibits accompanying the plea the following facts are shown:

stockholders of Wabco for the purpose of approving a sale of its assets to Commercial Credit Company; that said stockholders and Trans, because of their separate shares, were able to control any meeting of stockholders; that at a meeting of the stockholders held for the purpose of considering the proposed sale of the assets thereof to Commercial Credit Company they approved the making of a contract of sale. The contract is made a part of the complaint as an exhibit, and it and certain exhibits attached to it take up forty-six pages of the additional abstract. The following is the full important allegation in the amended complaint: "The sale price fixed in said contract of sale is at least \$10,000,000 less than the fair value of the assets sold thereunder." The complaint further alleges that as a result of the sale the profits realized thereon by the stockholders and Trans will be taxable, for Federal income tax purposes, not at the normal tax and surtax rates fixed by the United States Revenue Laws, but at fifteen per cent of the amounts of such profits; that plaintiffs and the remaining stockholders have sustained a loss through the said sale of the assets at a grossly inadequate price, that said sale works a fraud upon the stockholders of Wabco, other than the stockholders and Trans, and that the contract ought to be declared of no legal effect. The prayer for relief seeks a rescission of the contract with Commercial Credit Company, or, in the alternative, enforcement of liability personally against the stockholders, the Trans, and the directors of Wabco for the loss occasioned to the minority stockholders, including plaintiffs, through said sale. Defendants' motions to dismiss the amended complaint were sustained and an order was entered dismissing the amended complaint, from which order the instant appeal is presented. Defendants have filed in this court a motion in the nature of a plea of release of errors. By this plea and the affidavits and exhibits accompanying the plea the following facts are shown:

That on November 6, 1941, Nabco gave notice to all of its stockholders that a special meeting of the stockholders would be held on November 17, 1941, for the purpose of ratifying, approving and confirming the sale of its assets to Commercial Credit Company, and also to consider a plan for the liquidation of the corporation, under which there would be distributed to the holders of the outstanding preferred stock, in cash, an amount equal to the full par value of each share of said preferred stock, together with all dividends accrued thereon, and for the distribution of the remaining assets to the holders of the common stock; that on November 25, 1941, Nabco caused to be sent to each of its stockholders a notice that the sale of its assets to Commercial Credit Company had been consummated, and that a plan for the complete liquidation of the corporation had been adopted and approved by the stockholders at the meeting held November 17, 1941; that by this notice the stockholders were advised that under said plan of complete liquidation the first distributions to stockholders would be made in 1941; that on December 12, 1941, Nabco caused to be sent to all of its common stockholders a notice that on and after December 15, 1941, the first liquidating distribution of \$18 per share would be available to all of the common stockholders; that on March 4, 1942, certificates of common stock standing in the name of Nathan Katzin, plaintiff, were presented at The First National Bank of Chicago as the Paying Agent of the corporation in the matter of said first liquidating distribution of \$18 per share to the corporation's common stockholders, and Nathan Katzin was thereupon paid the sum of \$18 per share, or a total of \$3,600, and he received the same as first liquidating distribution on his shares of stock; that on October 9, 1942, the stock certificate of Edna Levy Weiss, plaintiff, was presented to said Paying Agent, and she was paid the sum of \$18 per share as a first

That on November 6, 1941, notice was given to all of its
stockholders that a special meeting of the stockholders would
be held on November 17, 1941, for the purpose of ratifying,
approving and confirming the sale of its assets to Commercial
Credit Company, and also to consider a plan for the liquidation
of the corporation, under which there would be distributed to
the holders of the outstanding preferred stock, in cash, an
amount equal to the full par value of each share of said pre-
ferred stock, together with all dividends accrued thereon, and
for the distribution of the remaining assets to the holders of
the common stock; that on November 22, 1941, notice was sent to
be sent to each of its stockholders a notice that the sale of
its assets to Commercial Credit Company had been consummated,
and that a plan for the liquidation of the corporation
had been adopted and approved by the stockholders at the meeting
held November 17, 1941; that by this notice the stockholders
were advised that under said plan of complete liquidation the
first distributions to stockholders would be made in 1941; that
on December 12, 1941, notice was sent to all of its
common stockholders a notice that on and after December 12,
1941, the first liquidating distribution of \$18 per share would
be available to all of the common stockholders; that on March 4,
1942, certificates of common stock standing in the name of
Nathan Katzin, plaintiff, were presented at the First National
Bank of Chicago as the paying agent of the corporation in the
matter of said first liquidating distribution of \$18 per share
to the corporation's common stockholders, and Nathan Katzin was
thereupon paid the sum of \$18 per share, or a total of \$3,600,
and he received the same as first liquidating distribution on
his shares of stock; that on October 9, 1942, the stock certifi-
cate of Anna Levy Weiss, plaintiff, was presented to said paying
Agent, and she was paid the sum of \$18 per share as a first

liquidating distribution on the 50 shares of common stock of the corporation standing in her name and she thereupon accepted said payment. Defendants contend that plaintiffs, by their aforesaid conduct, have waived and released any and all errors that they complain of in their appeal. We will briefly refer to certain of the authorities cited by defendants in support of their motion:

In Johnson v. King-Richardson Co., 36 F. (2d) 675, the complaint sought to maintain an action against the president of the corporation to compel him to account for certain alleged wrongful acts. The suit purported to be on behalf of all stockholders, but, as in the case at bar, no other stockholders joined with the complainant. In sustaining the dismissal of the suit the court said (p. 678):

"If a complaining stockholder may abandon or discontinue his suit, it is equally plain that if he has acquiesced in, or waived his right to, object to the wrong of which he complains, his suit may be dismissed; other stockholders not having been admitted as parties to the action."

In 13 Fletcher's Cyclopedia Corporations (Perm. Ed.) Ch. 58, Sec. 5362, the author states:

"A stockholder who, with knowledge of the facts, himself has given his consent to, or acquiesced in, acts of the directors or other corporate officers, or of majority stockholders, cannot ordinarily attack such acts afterwards. *** If a majority of the stockholders do or authorize an act as to which it is not within the power of a majority to bind the minority, but which would be valid if all consent, stockholders who do not take part may ratify the act, or may be estopped by acquiescence; and they will be held to have ratified or acquiesced in the act of the majority, if, with knowledge of the act, they unreasonably delay in giving notice of their dissent. *** So a stockholder cannot attack a wrongful or ultra vires act, where

...distributing distribution on the 30th of March 1900 of the corporation standing in her name and she thereupon accepted said payment. Defendants contend that plaintiffs, by their alleged conduct, have waived and released and all errors that they complain of in their appeal. We will briefly refer to certain of the authorities cited by defendants in support of their position:

In Johnson v. First National Bank Co., 36 W. 2d 675, the complaint sought to maintain an action against the president of the corporation to compel him to account for certain alleged wrongful acts. The suit purported to be on behalf of all stockholders, but in the case at bar, no other stockholders joined with the complainant. In sustaining the dismissal of the suit the court said (p. 678):

"If a complaining stockholder may abandon or discontinue his suit, it is equally plain that if he has acquiesced in, or waived his right to, object to the wrong of which he complains, his suit may be dismissed; other stockholders not having been admitted as parties to the action."

In 13 Fletcher's Cyclopaedia Corporations (Term. Ed.),

Ch. 78, sec. 7862, the author states:

"A stockholder who, with knowledge of the facts, himself has given his consent to, or acquiesced in, acts of the directors or other corporate officers, or of majority stockholders, cannot ordinarily attack such acts afterwards. If a majority of the stockholders do or authorize an act to which it is not within the power of a majority to bind the minority, but which would be valid if all consent, stockholders who do not take part may ratify the act, or may be estopped by acquiescence; and they will be held to have ratified or acquiesced in the act of the majority, if, with knowledge of the act, they unreasonably delay in giving notice of their dissent; and a stockholder cannot attack a wrongful or ultra vires act, where

he has accepted pecuniary benefits thereunder, with knowledge of the facts. Acceptance of dividends resulting from the act or thing complained of has in several instances been held to work an estoppel. *** If no other stockholders have joined as plaintiffs, the suit may be dismissed against the estopped plaintiff."

In Trounstone v. Remington Rand, Inc., 1942 A. 95, there was a reclassification of the stock of the defendant corporation because of arrears in cumulative dividends on the preferred stock. Two-thirds or more of each class of stock consented to the reclassification but the plaintiff did not consent and voted his shares in opposition, and he filed a suit to enjoin the defendant and directors from doing anything in furtherance of the plan. Thereafter he withdrew his motion for an injunction in the New York court and later transmitted his first preferred shares to the corporation with the request that certificates be issued to him in lieu thereof for the kinds of stock he was entitled to receive in accordance with the plan of reclassification. Later the Supreme Court of Delaware, in reversing a decree of the chancellor in a proceeding similar to the one commenced by Trounstone, stated (p. 99):

"The rule is a general one that he who participates in or acquiesces in an action has no standing in a court of equity to complain against it, even though the act be against the permission of the law. It was so held in Finch et al. v. Warrior Cement Corp., 16 Del. Ch. 44, 141 A. 54, where one who had participated in an unlawful issue of stock was denied the right to complain against its issuance. The principle has been affirmed in many decisions and applied in a great variety of fact situations. As a general rule equity will not hear a complain^{ant}/ stultify himself by complaining against acts in which he participated or of which he has demonstrated

he has accepted pecuniary benefits thereunder, with knowledge of the facts. Acceptance of dividends resulting from the act or thing complained of has in several instances been held to work an estoppel. ** If no other stockholders have joined as plaintiffs, the suit may be dismissed against the estopped plaintiff."

In Trombador v. Hamilton Bank, Inc., 1942 A. 97, there was a reclassification of the stock of the defendant corporation because of errors in cumulative dividends on the preferred stock. Two-thirds or more of each class of stock consented to the reclassification but the plaintiff did not consent and voted his shares in opposition, and he filed a suit to enjoin the defendant and directors from doing anything in furtherance of the plan. Thereafter he withdrew his motion for an injunction in the New York court and later transferred his first preferred shares to the corporation with the request that certificates be issued to him in lieu thereof for the kind of stock he was entitled to receive in accordance with the plan of reclassification. Later the Supreme Court of Delaware, in reversing a decree of the chancellor in a proceeding similar to the one commenced by Trombador, stated (p. 99):

"The rule is a general one that he who participates in or acquiesces in an action has no standing in a court of equity to complain against it, even though the act be against the permission of the law. It was so held in Finch et al. v. Carter Cement Corp., 16 Del. Ch. 44, 141 A. 54, where one who had participated in an unlawful issue of stock was denied the right to complain against its issuance. The principle has been affirmed in many decisions and applied in a great variety of fact situations. As a general rule equity will not hear a complainant ^{and} stultify himself by complaining against acts in which he participated or of which he has demonstrated

his approval by sharing in their benefits. This observation has added force where the acquiescence relates to rights of the assenting party that are contractual in nature, as is the situation in this case.

"In 2 Cook on Corporations (8th Ed.) p. 1673, it is said:

"A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit. Acquiescence may sometimes grow out of his silence or delay under circumstances that called on him to dissent if he so intended."

Defendants cite other cases and authorities analogous to the foregoing, but it would unduly lengthen this opinion to refer to all of them.

In plaintiffs' answer to defendants' motion to dismiss the appeal they contend that the act of Nathan Katzin in accepting his liquidation distribution on his shares of stock on March 4, 1942, occurred prior to the entry of the decree from which the appeal is taken and such act cannot be the basis of a plea of release of errors, and that the motion of defendants to dismiss is a single motion to dismiss "the appeal of the Appellants," and therefore the entire motion must be overruled. Plaintiffs also contend that while they sought in their complaint to have the contract of sale declared fraudulent and of no legal effect, they also sought, in the alternative, that if it appeared that no relief could be had against Commercial Credit Company, the purchaser, to charge the directors and majority shareholders of Nabco with personal liability for the losses sustained by the minority shareholders of such corporation by reason of the sale at the inadequate price; that defendant Commercial Credit Company could not be brought within the jurisdiction of the court and hence the

his approval by sharing in their benefits. This observation has added force where the acquiescence relates to rights of the assenting party that are contractual in nature, as is the situation in this case.

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In plaintiffs' answer to defendants' motion to dismiss

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accepting his liquidation distribution on his shares of stock

on March 4, 1942, occurred prior to the entry of the decree

from which the appeal is taken and such act cannot be the basis

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overruled. Plaintiffs also contend that while they sought

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against Commercial Credit Company, the purchaser, to charge

the directors and majority shareholders of Waco with personal

liability for the losses sustained by the minority shareholders

of such corporation by reason of the sale at the inadequate

price; that defendant Commercial Credit Company could not be

brought within the jurisdiction of the court and hence the

court was without jurisdiction to set aside the contract of sale; that "in the brief filed in this court, and in the arguments in support thereof, the appellants urge and argue solely their right to the alternative relief sought in the trial court, namely, the enforcement of the personal liability of the directors of Nabco Liquidating Company, and the shareholders thereof, for their wrongful and improper disposition of the corporate property, at a grossly insufficient price;" that "the appellants are therefore entitled to take and retain the liquidating distribution arising upon sale of the corporation property, and sue the directors and majority shareholders for the difference between the amount of such distribution and the fair market value of the corporate property sold." While defendants' motion may have some merit we have concluded to pass upon the appeal, and the instant motion is overruled.

Plaintiffs concede that as the trial court had no jurisdiction of the Commercial Credit Company the sale in question could not be set aside. They also concede that their right to relief against the directors and majority stockholders is based upon the following allegation in the amended complaint: "The sale price fixed in said contract of sale is at least \$10,000,000 less than the fair value of the assets sold thereunder." They contend that this allegation is a statement of fact and that defendants by their motion to strike admit the truth of the same. Defendants contend that the allegation is a mere conclusion of the pleader, unsupported by any allegation of fact that would tend to support the conclusion. It is the settled law that a motion to strike is in the nature of a general demurrer and it admits the truth only of facts properly pleaded, as distinguished from conclusions, and every allegation is to be taken most strongly against the pleader. The allegation in question, in our judgment, is a mere conclusion of the pleader.

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Plaintiffs should have pleaded facts sufficient to make out a prima facie showing that the conclusion of the pleader was warranted. Moreover, the pleader makes general allegations that the sale was a fraud upon plaintiffs and the minority stockholders and that it was brought about through a conspiracy of the Rothschilds and Franks, and it is a settled rule of law that allegations of conspiracy and fraud must show the facts upon which the allegations are based. (Doosé v. Doose, 300 Ill. 134, 139.) As defendants strenuously contend, there are facts shown in plaintiffs' complaint and the exhibits attached thereto that tend to rebut the conclusion of the pleader. It appears from plaintiffs' amended complaint and the exhibits attached thereto that Nabco, under the contract of sale of the assets, received \$18,978,205.64 for the same, which was almost \$2,000,000 more than the book value of the assets involved in the sale. There are cogent reasons shown by the record why the ordinary rules of pleading should not be weakened in order to give a semblance of vitality to the amended complaint. At the time of the sale in question Nabco had outstanding 612,200 shares of common stock. Plaintiffs together owned less than one-twentieth of one per cent of this stock. While they allege that the action is brought on behalf of themselves and all other minority stockholders, no other stockholders have joined in this litigation, and it must be presumed that the stockholders, other than plaintiffs, were satisfied with the terms of the sale. Under such a state of the record plaintiffs must make out a clear prima facie case in their complaint. There is no allegation in the complaint that the directors and majority stockholders have any interest in the company which purchased the assets. It appears that the founder of Nabco, its principal stockholder and chief executive officer, Melville N. Rothschild, died on July 17, 1941, and that at the time of the sale Nabco had outstanding bank loans of over \$57,000,000. The stockholders

Plaintiffs should have pleaded facts sufficient to make out a prima facie showing that the conclusion of the pleader was warranted. Moreover, the pleader makes general allegations that the sale was a fraud upon plaintiffs and the minority stockholders and that it was brought about through a conspiracy of the Rothschilds and Franks, and it is a settled rule of law that allegations of conspiracy and fraud must show the facts upon which the allegations are based. (Dodge v. Boess, 300 Ill. 134, 139.) As defendants strenuously contend, there are facts shown in plaintiffs' complaint and the exhibits attached thereto that tend to rebut the conclusion of the pleader. It appears from plaintiffs' amended complaint and the exhibits attached thereto that Nabco, under the contract of sale of the assets, received \$18,978,205.64 for the sale, which was almost \$2,000,000 more than the book value of the assets involved in the sale. There are cogent reasons shown by the record why the ordinary rules of pleading should not be weakened in order to give a semblance of vitality to the amended complaint. At the time of the sale in question Nabco had outstanding 612,200 shares of common stock. Plaintiffs together owned less than one-twentieth of one per cent of this stock. While they allege that the action is brought on behalf of themselves and all other minority stockholders, no other stockholders have joined in this litigation, and it must be presumed that the stockholders other than plaintiffs were satisfied with the terms of the sale. Under such a state of the record plaintiffs must make out a clear prima facie case in their complaint. There is no allegation in the complaint that the directors and majority stockholders have any interest in the company which purchased the assets. It appears that the founder of Nabco, its principal stockholder and chief executive officer, Melville J. Rothschild, died on July 17, 1941, and that at the time of the sale Nabco had outstanding bank loans of over \$27,000,000. The stockholders

were notified, on November 6, 1941, that a contract had been entered into for the sale of all of its assets and that a stockholders' meeting would be held on November 17, 1941, for the purpose of ratifying, approving and confirming the sale, and by the same notice the stockholders were informed that at said meeting there would be brought up for consideration a plan for the liquidation of the corporation under which the proceeds of the sale would be distributed to the stockholders. For aught that appears in the amended complaint plaintiffs attended the meeting of November 17, 1941, and there is no allegation that they objected to the sale then or at any time prior to the filing of the complaint. On November 25, 1941, Nabco sent to all of its stockholders a notice that the sale of assets had been consummated, that a plan for the complete liquidation of the corporation had been adopted, and that under this plan the first distributions to stockholders would be made in 1941. On December 12, 1941, a notice was sent to all stockholders to the effect that on December 15, 1941, there would be available to all common stockholders a liquidating distribution of \$18 per share. The original complaint was filed December 13, 1941, at which time plaintiffs knew that the sale of assets had been consummated and the purchase price, \$18,978,205.64, had been paid, and a plan adopted for the distribution of the proceeds of the sale among the stockholders. When, in addition to the aforesaid facts, it appears that plaintiffs have received and accepted their liquidating distribution of \$18 per share, it seems clear to us that the amended complaint is absolutely devoid of merit.

In conclusion, we feel impelled to quote the following argument from defendants' brief, made in support of their claim that under the record in this case it seems hardly credible that the instant action should be brought: "The prospects of the automobile finance business in October, 1941, were not good. Governmental regulations had been announced prior to that time,

were notified, on November 3, 1941, that a contract had been entered into for the sale of all of the assets and that a stockholders' meeting would be held on November 17, 1941, for the purpose of ratifying, approving and confirming the sale, and by the same notice the stockholders were informed that at said meeting there would be brought up for consideration a plan for the liquidation of the corporation which the proceeds of the sale would be distributed to the stockholders. For aught that appears in the amended complaint plaintiffs attended the meeting of November 17, 1941, and there is no allegation that they objected to the sale then or at any time prior to the filing of the complaint. On November 15, 1941, a notice to all of the stockholders a notice that the sale of assets had been consummated, that a plan for the complete liquidation of the corporation had been adopted, and that under this plan the first distributions to stockholders would be made in 1941. On December 13, 1941, a notice was sent to all stockholders to the effect that on December 13, 1941, there would be available to all common stockholders a liquidating distribution of \$18 per share. The original complaint was filed December 13, 1941, at which time plaintiffs knew that the sale of assets had been consummated and the purchase price, \$18,978,505.64, had been paid, and a plan adopted for the distribution of the proceeds of the sale among the stockholders. When, in addition to the aforesaid facts, it appears that plaintiffs have received and accepted their liquidating distribution of \$18 per share, it seems clear to us that the amended complaint is absolutely devoid of merit.

In conclusion, we feel impelled to quote the following argument from defendants' brief, made in support of their claim that under the record in this case it seems hardly credible that the instant action should be brought: "The prospects of the automobile finance business in October, 1941, were not good. Governmental regulations had been announced prior to that time

restricting the production of automobiles. Other governmental regulations had been announced restricting consumer credit. The Selective Service Act was drafting millions of men who in normal times would constitute a large part of the market for the purchase of automobiles on the installment basis. The effect of the World War on general business conditions and the possibility that the United States might become involved directly in the war were daily growing more imminent. There was a decided increase in the cost of doing business by reason of rising wages, increased taxes, rents, etc. There was increased risk in the collection of outstanding notes receivable because of the Selective Service Act and Soldiers' and Sailors' Civil Relief Act, and the possibility of greatly increased removal of borrowers from their normal occupations. The market values of equity securities from the year 1936 to October, 1941, as reflected in the average prices on the New York and other stock exchanges, and caused by the world economic conditions, showed great uncertainty as to the future. There generally prevailed a large reduction of net earnings by large corporate businesses, irrespective of increases of volume and of gross earnings."

The decretal order of the Circuit court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

restricting the production of automobiles. Other governmental regulations had been announced restricting consumer credit. The Selective Service Act was drafting millions of men who in normal times would constitute a large part of the market for the purchase of automobiles on the installment basis. The effect of the World War on general business conditions and the possibility that the United States might become involved directly in the war were daily growing more imminent. There was a decided increase in the cost of doing business by reason of rising wages, increased taxes, rents, etc. There was increased risk in the collection of outstanding notes receivable because of the Selective Service Act and Soldiers' and Sailors' Civil Relief Act, and the possibility of greatly increased removal of borrowers from their normal occupations. The market value of equity securities from the year 1915 to October, 1917, as reflected in the average prices on the New York and other stock exchanges, and caused by the world economic conditions, showed great uncertainty as to the future. There generally prevailed a large reduction of net earnings by large corporate businesses, irrespective of increases of volume and of gross earnings."

The general order of the Circuit Court of Cook County

is affirmed.

ORIGINAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42794

JAMES BETINIS and
JAMES PHOTAKIS,

Appellees,

v.

S. J. GREGORY,

Appellant.

38
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

323 I.A. 287

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

James Photakis, plaintiff, commenced an action at law, in the Superior court of Cook county, against S. J. Gregory, defendant, to enforce payment of a check for \$4,000, dated April 22, 1940, payable to the order of James Betinis, plaintiff, signed by defendant and indorsed and delivered by Betinis to Photakis. The Cicero State Bank commenced an action at law, in the Circuit court of Cook county, against defendant, to enforce payment of a note for \$8,500, signed by defendant, dated April 20, 1940, due in six months, payable to the order of James Betinis, plaintiff, and indorsed and delivered by Betinis to said Bank. Thereafter the Bank returned the note to Betinis and he was substituted as plaintiff in lieu of the Bank. The Photakis case was transferred to the Circuit court and was consolidated with the case wherein Betinis was plaintiff. Defendant filed in the Photakis case an answer, which alleges that Photakis was not a holder in due course of the check. Defendant filed an answer to the suit of Betinis in which he alleged that the \$8,500 note was executed by him and delivered to Betinis conditionally and that it was not intended to take effect as a promissory note until the happening of that condition. Prior to the consolidation of the two cases defendant filed in the Circuit court case a counterclaim against Betinis and Photakis in which he alleged, in substance, the matters set forth in his answers to the two suits - as to the Photakis claim defendant alleges that he was entitled to a

42794

JAMES H. HILL and
JAMES H. HILL

Defendants,

v.

J. J. BRADLEY,

Appellant.

3331A.287

THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA

James H. Hill, Plaintiff, commenced an action at law in the Superior Court of Cook County, Illinois, against J. J. Bradley, Defendant, to enforce payment of a check for \$5,000, dated April 22, 1940, payable to the order of James H. Hill, and delivered by defendant and indorsed and delivered by Hill to Plaintiff. The above state was amended and action at law, in the Circuit Court of Cook County, Illinois, to enforce payment of a note for \$5,000, dated by defendant, dated April 22, 1940, and in six counts, payable to the order of James H. Hill, and indorsed and delivered by defendant to said Hill. Thereafter the said amended note to Hill and he was substituted as Plaintiff in that of the same. The Plaintiff's case was transferred to the Circuit Court and was consolidated with the case wherein Hill was Plaintiff. Defendant filed in the Plaintiff's case an answer, which alleges that Plaintiff was not a holder in due course of the check. Defendant filed in answer to the bill of Hill in which he alleged that the \$5,000 note was executed by him and delivered to Hill conditionally and that it was not intended to take effect as a promissory note until the happening of that condition. Prior to the consolidation of the two cases defendant filed in the Circuit Court case a counterclaim against Hill and Plaintiff in which he alleged, in substance, the matters set forth in his answers to the two suits - as to the Plaintiff's claim defendant alleges that he was entitled to a

set-off of \$1,100 against the \$4,000 check. The counterclaim sought to bring about a consolidation of the two cases, to obtain a surrender of the \$4,000 check after allowing a credit thereon, a surrender of the \$8,500 note, and an injunction against a transfer of the check and note. The consolidated cases were tried before the court without a jury. There was a finding and judgment in favor of Photakis, plaintiff, for \$4,000; a finding and judgment in favor of Betinis, plaintiff, for \$9,555.43, and the counterclaim was dismissed. Defendant appeals.

Defendant contends: (a) "The Court erred in not finding that the \$4000 Check is subject to a reduction or set-off in the amount of \$1100 in the hands of Photakis." (b) "The Court erred in not finding that the \$8500 Note never became a legally enforceable obligation." (c) "The Court erred in not sustaining the counterclaim to the extent of ordering a surrender for cancellation of the \$4000 Check and the \$8500 Note, enjoining the transfer of such Check and Note, and enjoining the prosecution of the actions at law thereon."

No point is raised on the pleadings. The trial court properly held that the decision of the case involved only questions of fact.

Betinis, Gregory and John L. Manta, a copurchaser with Gregory of the oil interests in question from Betinis, were all born in Greece. Gregory and Manta were close personal friends and their families seem to have been intimate; they were both friendly to Betinis prior to the transaction in question. All were men of considerable business experience. On the invitation of Manta, defendant went to Centralia, Illinois, about April 1, 1940, to look over certain oil wells that Manta and others owned. Manta wanted defendant to invest money in them. A few days after that time defendant, with his lawyer, Lazarus Krinsley,

went to Centralia and bought interests in two oil leaseholds, that were not involved in the transaction in question. By April, 1940, Gregory, through Manta, had invested \$35,000 in oil leases in downstate Illinois. On April 20, 1940, Betinis was the owner of certain fractional shares of leases on oil land in the Centralia district. After certain conversations between defendant and Betinis, the details of which are disputed, Gregory agreed to buy and Betinis agreed to sell all of his interests in the oil leases. At the request of defendant the parties met at the law offices of Krinsley, in Chicago, on Saturday evening, April 20, 1940, for the purpose of closing the deal. Gregory; Attorney Krinsley; Mr. and Mrs. Betinis; Richard R. Klein, attorney for Betinis, and Krinsley's stenographer were present. Gregory informed his attorney that he had made a deal with Betinis to purchase all of the latter's interest in the Centralia oil leases and he asked Krinsley to check over the leases and draw assignments of them to Manta. He further told Krinsley that for the assignments he was to give Betinis \$14,000 in cash, a note for \$8,500, payable in six months, and assume the obligations that Betinis had incurred in drilling the wells, approximately \$8,500. Gregory stated that he did not tell Krinsley nor did anybody else tell him that the note was to be paid upon conditions; that he did not tell Krinsley that Betinis was to hold the note and not negotiate it. Krinsley drafted assignments from Betinis and his wife to Manta, and Betinis and his wife signed them. Gregory gave Krinsley a blank check and Krinsley filled it out, making it payable to Betinis, in the sum of \$14,000. Gregory then signed the check and turned it over to Betinis. Krinsley also made out a note for \$8,500, payable to the order of Betinis, due in six months, which Gregory signed and turned over to Betinis. Krinsley drew up an agreement by the terms of which Gregory took the lease assignments subject to all outstanding obligations

went to California and bought interests in two oil leases, the first was not involved in the transaction in question. On April, 1940, Gregory, through his wife, had invested \$25,000 in oil leases in Los Angeles County. On April 20, 1940, Gregory was the owner of certain fractional shares of leases on oil land in the California district. After certain conversations between defendant and Gregory, the details of which are discussed, Gregory agreed to buy and Gregory agreed to sell all of his interests in the oil leases. At the request of defendant the parties met at the law offices of Trimble, in Chicago, on Saturday evening, April 20, 1940, for the purpose of closing the deal. Gregory, attorney Trimble, and Mrs. Gregory, Richard E. Trimble, attorney for Gregory, and William H. Gregory, attorney for Gregory, were present. Gregory informed his attorney that he had made a deal with Gregory to purchase all of the interests in the California oil leases and he asked Trimble to check over the leases and draw assignments of them to him. He further told Trimble that for the assignments he was to give Gregory \$14,000 in cash, a note for \$2,500, payable in six months, and that the obligation that Gregory had incurred in drilling the wells, approximately \$2,500, Gregory stated that he did not tell Gregory nor did anybody else tell him that the deal was on the basis of such conditions; that he did not tell Gregory that Gregory was to hold the note and not mortgage it. Trimble drafted a lease from Gregory and his wife to Gregory, and Gregory and his wife signed them. Gregory gave Trimble a check for \$14,000, cashed it out, making it payable to Gregory, in the sum of \$14,000. Gregory then signed the check and turned it over to Gregory. Gregory also made out a note for \$2,500, payable to the order of Gregory, and in six months, which Gregory signed and turned over to Gregory. Trimble drew up an agreement by the terms of which Gregory took the lease assignments subject to all existing obligations

against Betinis and he assumed and agreed to pay approximately \$8,500 of such obligations, and Gregory signed this agreement and gave it to Betinis. Defendant did not have on deposit in his bank sufficient funds to cover the \$14,000 check and he requested Betinis to hold it until Monday, at which time arrangements would be made to give Betinis the cash. It was then agreed that Krinsley would hold the assignments in escrow until Betinis received his \$14,000. On Monday, April 22, Betinis went to defendant's office to get the \$14,000, but instead he was given \$10,000 in cash and a check for \$4,000 and he was asked to hold the check for about a week or ten days. Betinis agreed to this arrangement and accepted the cash and check. Krinsley then delivered the assignments to Gregory. When asked why he withheld from his lawyer the fact that there was a condition attached to the note, his answer was, "I didn't tell Krinsley that the note was to be paid upon condition because Krinsley told me not to go into the deal, not to enter any business transactions with Betinis. I overruled him when I made the deal. I did not tell Krinsley what the conditions of it were because he wasn't interested." The testimony of Attorney Klein corroborates that of Betinis as to what transpired at the Saturday evening meeting at Krinsley's office. Defendant also testified that on Saturday morning, April 20, in his office, he and Betinis agreed that the \$8,500 note was not to be paid unless within a period of six months he received back out of the proceeds of the purchased interest not only the \$14,000 plus \$8,500, but also a profit. Betinis denied that he ever told defendant that he would hold the note for six months and not negotiate it, and denied that defendant had ever requested him to hold the note for six months or to hold it for any time, that there was nothing ever said at any time between Gregory and himself about the note being payable upon any condition of any kind. He further testified that the

against Betinis and he assumed and agreed to pay approximately \$8,500 of such obligations, and Gregory signed this agreement and gave it to Betinis. Defendant did not have on deposit in his bank sufficient funds to cover the \$14,000 check and he requested Betinis to hold it until Monday, at which time arrangements would be made to give Betinis the cash. It was then agreed that Trinsley would hold the assignments in escrow until Betinis received his \$14,000. On Monday, April 22, Betinis went to defendant's office to get the \$14,000, but instead he was given \$10,000 in cash and a check for \$4,000 and he was asked to hold the check for about a week or ten days. Betinis agreed to this arrangement and accepted the cash and check. Trinsley then delivered the assignments to Gregory. When asked why he withheld from his lawyer the fact that there was a condition attached to the note, his answer was, "I didn't tell Trinsley that the note was to be paid upon condition because initially I did not go into the deal, not to enter any business transaction with Betinis. I overruled him when I made the deal. I did not tell Trinsley what the conditions of it were because he wasn't interested." The testimony of Attorney Klein corroborates that of Betinis as to what transpired at the Saturday evening meeting at Trinsley's office. Defendant also testified that on Saturday morning, April 20, in his office, he and Betinis agreed that the \$8,500 note was not to be paid unless within a period of six months he received back out of the proceeds of the purchased interest not only the \$14,000 plus \$8,500, but also a profit. Betinis denied that he ever told defendant that he would hold the note for six months and not negotiate it, and denied that defendant had ever requested him to hold the note for six months or to hold it for any time, that there was nothing ever said at any time between Gregory and himself about the note being payable upon any condition of any kind. He further testified that the

deal between defendant and himself was consummated in Krinsley's office in accordance with the understanding between defendant and himself. The trial court, in the lengthy opinion he rendered in deciding the case, stated that the excuse given by defendant as to why he did not tell his attorney, Krinsley, that the note was to be paid upon condition "was ridiculous and preposterous," that "it is inconceivable to me to locate all these men and one woman in Mr. Krinsley's office, to prepare every document, including the note, and to permit his lawyer to go through with a deal of \$22,500.00, \$14,000 by check, \$8500.00 by note, without having said one single word to anybody among themselves or to Mr. Krinsley by his own client, 'There are conditions on this note. I know it is dangerous, you had better put something on the back of that note, "Conditioned upon profits."' Gregory would have told him, as sure as I am sitting here, and I can't conceive anything else. That is the controlling factor in the whole situation. * * * It was a simple thing to put on the back of that note, 'Conditioned upon profits,' and Krinsley would certainly have done it, but they admitted he didn't tell it to Les [Krinsley]." It is a significant fact that while Attorney Krinsley, during the trial, withdrew as attorney for Gregory so that he might be eligible to testify in his behalf, that neither he nor his secretary, a stenographer, were called as witnesses. As the trial court stated, if defendant had told his attorney about the alleged oral agreement, his attorney would not have consummated the deal as it was consummated. Defendant testified that he knew at the time he gave Betinis the note that if the latter broke his promise and gave the note to someone that he would have no defense to the note.

Defendant argues that Betinis was extremely anxious to get rid of his oil holdings but that he, Gregory, did not desire to purchase the same, and that he was rushed into the deal

...between defendant and witness was connected in ...
...in accordance with the instructions between defendant ...
...the trial court, in the opening statement the ...
...the case, stated that the evidence given by defendant ...
...as to why he did not tell his attorney, ...
...as to be held upon condition "not to ...
...that "it is inadvisable to me to ...
...room in the attorney's office, to ...
...the note, and to permit his ...
...of \$2,000, ...
...having said one single word to ...
...the attorney of his own client, there ...
...note. I know it is dangerous, you ...
...the back of that note, "conditional ...
...have told him, as sure as I am ...
...anything else. This is the ...
...situation. ... it was a ...
...that note, "conditional upon ...
...they have done it, but they ...
...[redacted] it is a significant fact that ...
...Krimley, during the trial, withdrew as ...
...that he might be eligible to testify in his ...
...as was his secretary, a stenographer, who ...
...as the trial court stated, it is ...
...about the alleged oral agreement, his ...
...concerned the fact as it was ...
...that he knew at the time he gave ...
...leave from his position and gave the ...
...could have no defense to the note.
...that witness that ...
...of his old holdings but that he, ...
...the same, and that he was ...

through Manta, his friend and adviser. Undoubtedly Betinis wished to sell his holdings, but it is also clear that Manta and Gregory, a few days before the consummation of the deal, were more than anxious to obtain them. It appears from Manta's testimony that around two o'clock a. m. on Saturday an oil well known as the Kaelin No. 2 started to come in and he called up defendant at that time and told him that "Kaelin No. 2 was coming in and it was a good deal * * * and told him I thought it was a good deal * * * and I said I thought it would be a good well to buy all the time;" that Gregory said he did not have the cash and Betinis wanted cash money; that he, Manta, said to Gregory: "You go ahead and close the deal and I will be down on Monday and I will have some money;" that he told Gregory to close the deal on the basis of \$14,000 in cash, an \$8,500 note, and to agree to pay all the outstanding bills; that he told Gregory to get hold of Betinis; that the deal looked good; that "Gregory said he had been trying to get a-hold of Betinis but he couldn't get him;" that he, Manta, told Gregory he would bring \$10,000 in cash. Manta also testified that he told Gregory at the time that he would go "50-50" with him on the deal. Manta also testified that gas from Kaelin No. 2 came in Saturday morning and the oil came in about eight or ten hours afterward; that he told Gregory that Kaelin No. 2 "is going to be a big well." Manta further testified that when the oil came it "bust all the equipment we have connected, bust everything up." Betinis testified that on Saturday afternoon his wife called him up and told him that Gregory was calling there every fifteen minutes and wanted to get in touch with Betinis; that his office told him that Gregory was trying to get in touch with him; that he then called up Gregory and the latter told him to go to Krinsley's office, as he was ready to go through with the deal and would close it that day. It seems

through Langer, his friend and adviser, undoubtedly Bettina
wished to sell the house, but it is also clear that
and Gregory, a few days before the completion of the deal,
were more than anxious to obtain the oil. It came from Langer's
testimony that around two o'clock on Saturday an oil well
known as the Berlin No. 2 started to come in and he called up
defendant at that time and told him that "Berlin No. 2 was
coming in and it was a good deal" and told him I thought
it was a good deal and I said I thought it would be a
good well to pay all the time; that Gregory would be the not
have the cash and Bettina wanted cash; that on Sunday, Bettina
said to Gregory: "You go ahead and close the deal and I will
be down on Monday and I will have some money" that he told
Gregory to close the deal on the basis of \$10,000 in cash, and
\$5,000 note, and to agree to pay all the outstanding bills;
that he told Gregory to get hold of Bettina; that the deal
looked good; that Gregory said he had been trying to get a hold
of Bettina but he couldn't get him; that he, Bettina, told Gregory
he would bring \$10,000 in cash. Bettina also testified that he
told Gregory at the time that he would go "up" with him on
the deal. Bettina also testified that he took Bettina No. 2 down
in Saturday morning and the oil came in about eight or ten hours
afterward; that he told Gregory that Berlin No. 2 was going to
be a big well. Bettina further testified that when the oil came
it "beat all the equipment we have connected, but everything
up." Bettina testified that on Saturday afternoon his wife
called him up and told him that Gregory was calling there
every fifteen minutes and wanted to get in touch with Bettina;
that his oil told him that Gregory was trying to get in
touch with him; that he then called up Gregory and the latter
told him to go to Langer's office, as he was ready to go
through with the deal and would close it that day. It seems

reasonably clear from the evidence that after defendant received word that the well known as Kaelin No. 2 was coming in with a rush he, as well as Manta, became anxious to close the deal. As an aftermath of the transaction defendant proved that about sixty days after the consummation of the deal, the wells in question closed up and "everybody lost money down there." Defendant offered to prove "that the wells were dried up and they are still dry and will be dry," and it was thereupon admitted that such was the situation. Defendant testified that after the deal was consummated he received \$12,688 from the oil under the leases that he acquired from Betinis but that he did not expect any more money to come to him from that source. What Manta, a copurchaser with defendant, received, if anything, from the oil under the said leases does not appear. The trial court was justified in assuming that the closing down of the wells brought about the defense interposed in the instant case. While on the trial defendant testified, as we have heretofore stated, that on Saturday morning, April 20, in his office he and Betinis agreed that the \$8,500 note was not to be paid unless within a period of six months he received back out of the profits of the purchased interests not only the \$14,000 plus \$8,500, but also a profit, in his verified answer to the Photakis suit defendant alleges that the agreement was that the note was not to be paid unless the wells continued to produce oil in paying quantities and the new well known as Kaelin No. 2 then being drilled came in and produced oil in paying quantities.

Plaintiff Betinis contends that in his suit there was just one issue, viz., Was the \$8,500 note executed by Gregory and turned over to Betinis delivered conditionally and not intended to take effect as a promissory note until the happening of that condition. Plaintiff also contends that defendant asserts that the delivery of the note was conditional and,

reasonably clear from the evidence that after defendant re-
ceived word that the well known as Loeblin No. 2 was coming in
with a rush he, as well as others, became anxious to close the
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the oil under the said leases does not appear. The fact I cannot
was justified in assuming that the closing down of the wells
prompt about the parties interested in the instant case. While
on the trial defendant testified, as we have heretofore stated,
that on Saturday morning, April 22, in the oil of Loeblin No. 2 and Bettina
agreed that the \$2,500 note was not to be paid unless within a
period of six months he received back out of the profits of the
purchased interests not only the \$14,000 plus \$2,500, but also
a profit, in his verified answer to the Plaintiff's suit defendant
alleges that the agreement was that the note was not to be paid
unless the wells continued to produce oil in paying quantities
and the new well known as Loeblin No. 3 then being drilled came
in and produced oil in paying quantities.

Plaintiff Bettina contends that in his suit there was
that one issue, viz., "as the \$2,500 note executed by Gregory
and turned over to Bettina delivered conditionally and not in-
tended to take effect as a promissory note until the happening
of that condition. Plaintiff also contends that defendant
asserts that the delivery of the note was conditional and,

therefore, had the burden of proving the conditional delivery and that the evidence to establish such delivery must be clear, convincing and specific. In support of this contention plaintiff Betinis cites Sec. 16 Un. Neg. Inst. Act, sec. 36, Chap. 98, Ill. Ann. Stat., which provides in part: "* * * And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved," and also cites our decision in Anderson Nat. Bank v. Jacobson, 305 Ill. App. 169, 177, where we said in commenting upon section 16: "This placed the burden of proving conditional delivery upon defendant." Plaintiff Betinis also cites Cusanelli v. Steele, 287 Ill. App. 490, 497, where the court said:

"Whoever asserts that the delivery of a promissory note was conditional, had the burden of proving same, and the evidence to establish such fact should be clear, convincing and specific. Dairyman's State Bank v. Dunham, 271 Ill. App. 249."

We may say that regardless of the aforesaid rule the evidence conclusively shows that the defense interposed by defendant was an afterthought and that the trial court was justified in finding that the evidence in support of the defense was unworthy of belief. In Hadley v. White, 367 Ill. 406, 409, the Supreme court stated:

"We have long adhered to the rule that when a chancellor has heard the testimony in open court, has had an opportunity to see the witnesses and listen to their testimony from the stand, we will not reverse his findings of fact unless we are able to say that they are palpably contrary to the weight of the testimony. (Cook v. Wolf, 296 Ill. 27; Moore v. Moore, 335 id. 517; Hall v. Pittenger, 365 id. 135.) The rule applies in this case because the basically essential questions for the court to try were ones of fact * * *."

We are satisfied that the finding and judgment of the

therefore, and the burden of proving the conditional delivery
and that the evidence to establish such delivery must be clear,
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tiff Betina cites Sec. 16 Un. Ins. Act, sec. 36, Chap.
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the instrument is no longer in possession of a party whose sig-
nature appears thereon, a valid and intentional delivery by him
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decision in Anderson Nat. Bank v. Jacobson, 305 Ill. 109, 110,
117, where we said in commenting upon section 16: "This placed
the burden of proving conditional delivery upon defendant."
Plaintiff Betina also cites Quinn v. Steele, 287 Ill. 111, 112,
490, 497, where the court said:
"However, asserts that the delivery of a promissory note
was conditional, had the burden of proving same, and the evi-
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335 Ill. 217; Hall v. Pittenger, 365 Ill. 135.) The rule applies
in this case because the basically essential questions for the
court to try were ones of fact * * *"
We are satisfied that the finding and judgment of the

trial court as to the claim of Betinis must be sustained.

As to the suit of Photakis against defendant: In February, 1940, Photakis gave Betinis \$1,000 to invest in oil wells in the Centralia area with the understanding that Photakis was to profit or lose in the proportion that the \$1,000 bore to the total amount that Betinis invested. Betinis used the \$1,000 when he purchased some of the interests in question and after he disposed of his interests to defendant, Betinis paid back the \$1,000 to Photakis by indorsing and delivering to him the \$4,000 check that defendant gave in part consummation of the deal and Betinis received a check from Photakis for \$3,000. Photakis had nothing to do with negotiating or closing the deal between Betinis and Gregory and there is no evidence that when he took the check from Betinis he had any knowledge whatsoever that the check was subject to any defense or that Gregory claimed that it was so subject. Betinis told Photakis to hold the check for a week or ten days and he did so, but when that time had elapsed he could not find the check and he has never been able to find it. Photakis testified that Manta told him that as soon as Gregory came to Chicago he would have him make another check for Photakis; that he notified his lawyer, Mr. Klein, of the loss of the check. Attorney Klein testified that he then called up Gregory and told him that the \$4,000 check was lost and asked him to stop payment on the check and give Betinis another check, and Gregory said that he would do so, that Klein should contact him in a couple of days and he would issue another check; that subsequently he tried to get in contact with defendant but was unsuccessful. Defendant testified that when Photakis asked him for another check he told him that he thought Betinis was not entitled to \$4,000, that he was entitled to less; that the expense on the wells exceeded \$8,500 and that he would like to give Photakis the difference; that he told Photakis that if the latter would deduct the extra

trial court as to the claim of Betinis must be sustained.
As to the suit of Photakis against defendant in
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the total amount that Betinis invested. Photakis gave the \$1,000
when he purchased some of the interests in question and after
he disposed of his interests to defendant, Betinis paid over the
\$1,000 to Photakis by indorsing and delivering to him the \$1,000
check that defendant gave in part consideration of the deal and
Betinis received a check from Photakis for \$3,000. Photakis had
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the check from Betinis he had any knowledge whatsoever that the
check was subject to any defense or that Gregory claimed that
it was so subject. Betinis told Photakis to hold the check
for a week or ten days and he did so, but when that time had
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that when Photakis asked him for another check he told him that
he thought Betinis was not entitled to \$4,000, that he was
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and that he would like to give Photakis the difference; that
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expense on the well, he would give him another check; that Photakis said he did not know anything about the deal between defendant and Betinis and that he had nothing to do with that deal. It will be noted that defendant finally refused to issue another check two or three months after the check was lost, at which time the wells had dried up. Defendant further testified that he expected to pay \$14,000 in cash to Betinis, as he expected Manta to bring him \$14,000 in cash, but that Manta brought only \$10,000; that he gave Betinis two reasons why he wanted him to hold the \$4,000 check, - one was that his bank account was short and the other was that he wished to determine the exact amount of the debts; that when he gave the \$4,000 check he had very close to enough money in the bank to cover the check. Upon cross-examination defendant admitted that when his deposition was taken on February 10, 1941, the following questions were asked him, to which he gave the following answers: "Q. Was the \$4,000 check to be dependent on whether the well kept going? A. Only the note was to stay in Betinis' possession for the duration of 6 months. Q. What about the check? A. The check he was going to hold for a few days because when I gave it to him I didn't have money in the bank." The trial court found that there was no condition attached to the check save that defendant requested that it be held for ten days or two weeks because he did not have enough money in the bank to meet the check; that when the check was lost he agreed to make it good and that he finally failed to do so because the wells petered out. We agree with these findings. We have considered the claim of defendant that he is entitled to a set-off of \$1,100 against the check because Photakis had given Betinis \$1,000 to invest in oil interests and that, therefore, he was not a holder in due course of the check, and we find no merit in the claim. As we read this record the trial court was justified in finding that Photakis

expense on the bill, he would give him another check; but Photakis said he did not know anything about the real balance defendant and Petinis and that he was willing to do with that deal. It will be noted that defendant finally refused to issue another check two or three months after the check was lost, at which time the wells had died up. Defendant further testified that he expected to pay \$14,000 in cash to Petinis, as he expected wants to bring his \$14,000 in cash, but that wants brought only \$10,000; that he gave Petinis two reasons why he wanted him to hold the \$4,000 check - one was that his bank account was short and the other was that he wanted to determine the exact amount of the deposit; that when he gave the \$4,000 check he had very close to enough money in the bank to cover the check. Upon cross-examination defendant admitted that when his deposition was taken on January 10, 1941, the following questions were asked him, to which he gave the following answers: "Q. Was the \$4,000 check to be deposited on whether the well kept coming? A. Well, the rate was to stay in Petinis' possession for the duration of 6 months. Q. What about the check? A. The check he was going to hold for a few days because when I gave it to him I didn't have money in the bank." The trial court found that there was no written attached to the check save that defendant requested that it be held for ten days or two weeks because he did not have enough money in the bank to meet the check; that when the check was lost he agreed to issue it good and that he finally failed to do so because the wells petered out. He agrees with these findings. We have considered the claim of defendant that he is entitled to a set-off of \$1,100 against the check because Photakis had given Petinis \$1,000 to invest in oil interests and that, therefore, he was not a holder in due course of the check, and we find no merit in the claim. As we read this record the trial court was justified in finding that Photakis

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was a holder in due course of the check.

The judgment entered in the case of James Photakis v. S. J. Gregory, the judgment entered in the case of James Betinis v. S. J. Gregory, and the judgment dismissing defendant's counterclaim, are all affirmed.

JUDGMENTS AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

and a letter to the owner of the house.

The following is the text of the letter:

My dear Sir,
I have the pleasure to inform you that the
proceedings of the Court in the case of
the People v. [Name] have been
concluded, and all parties
satisfied.

Very respectfully,
[Signature]

Witness my hand and seal this 1st day of
[Month], 18[Year].

42853

LESTER AL SMITH,
Appellee,

v.

HOTEL SHERMAN, INC.,
a corporation,
Appellant.

39
A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

323 I.A. 288'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Upon a trial by the court without a jury there was a finding against defendant and judgment was entered in favor of plaintiff for \$178. Defendant appeals.

Plaintiff's statement of claim alleges that his wardrobe trunk and traveling bag were delivered to defendant by a transfer company in perfect condition and that defendant delivered the trunk and bag to plaintiff's room with the locks broken off and certain articles missing.

Defendant contends that the finding and judgment of the trial court are against the manifest weight of the evidence. On December 19, 1942, plaintiff and his wife left a hotel in Detroit, traveled to Chicago, and on the same day registered at the Hotel Sherman in Chicago. Plaintiff's luggage consisted of a theatrical wardrobe trunk and a big wardrobe bag. No claim is made that the trunk was damaged or that any articles were taken from it. Plaintiff checked the trunk in Detroit but took the wardrobe bag with him. When plaintiff and his wife arrived at the Chicago station the bag was "picked up" by a redcap, and then the Central Transfer Company, at the depot, picked up the bag for delivery to plaintiff at the Hotel Sherman. Plaintiff testified that when that company took the bag in the Chicago depot it was in good condition. The trunk and wardrobe bag were not delivered by the transfer company to the Hotel Sherman until the night of December 22. Plaintiff's wife was in the lobby of the hotel three or four times that night looking for her baggage, and

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When plaintiff and his wife arrived at the Chicago station the bag was "picked up" by a redcap, and then the Central Transfer Company, at the depot, picked up the bag for delivery to plaintiff at the Hotel Sherman. Plaintiff testified that when that company took the bag in the Chicago depot it was in good condition. The trunk and wardrobe bag were not delivered by the transfer company to the Hotel Sherman until the night of December 22. Plaintiff's wife was in the lobby of the hotel three or four times that night looking for her baggage, and

each time she asked Michael Joseph Farrell, the baggageman at the hotel, if her baggage had been delivered, and each time that Mrs. Smith spoke to Farrell he told her that as soon as the baggage came he would call her up and take it to her room. Farrell was on the watch for the baggage. Around eleven o'clock the bell from the receiving platform of the hotel rang and he went out to answer it. The driver for the Central Transfer Company had set the baggage in question on the loading platform. Farrell testified that he signed for the baggage but did not examine the receipt, as he was in a hurry to get the baggage up to Mrs. Smith's room because he knew she was waiting for it; that he brought the baggage up to plaintiff's room and five minutes had not elapsed between the time the baggage was delivered by the transfer company and the time that he delivered it in plaintiff's room, and that the baggage was in his possession every minute of the five minutes; that when he wheeled the baggage into Smith's room, Mrs. Smith noticed that the locks on the bag were broken and she said, "I am going to sue the transfer company because this bag was in good condition when they got it," to which Farrell answered, "Well, I don't know, these things happen in the railroad." Upon cross-examination Farrell testified that that was the only baggage he received at the time; that before that time he had seen receipts of the transfer company; that "the baggage looked all right when I signed for it;" that "it seemed to be all together when I took it up." Upon redirect Farrell testified that when he brought the bags up from the baggage room he did not bang anything nor hit anything, that he handled the baggage very carefully; that he put it on the truck and put it on the elevator and went right up to the room; that the first time that he saw that the lock was broken was in the room, when Mrs. Smith called his attention to it. Upon recross Farrell testified that if he had

each time she asked Michael Joseph Farrell, the baggage man at the hotel, if her baggage had been delivered, and each time that Mrs. Smith spoke to Farrell he told her that as soon as the baggage came he would call her up and take it to her room. Farrell was on the watch for the baggage. Around eleven o'clock the bell from the receiving platform of the hotel rang and he went out to answer it. The driver for the Central Transfer Company had set the baggage in question on the loading platform. Farrell testified that he signed for the baggage but did not examine the receipt, as he was in a hurry to get the baggage up to Mrs. Smith's room because he knew she was waiting for it; that he brought the baggage up to plaintiff's room and five minutes had not elapsed between the time the baggage was delivered by the transfer company and the time that he delivered it in plaintiff's room, and that the baggage was in his possession every minute of the five minutes; that when he wheeled the baggage into Smith's room, Mrs. Smith noticed that the locks on the bag were broken and she said, "I am going to see the transfer company because this bag was in good condition when they got it," to which Farrell answered, "Well, I don't know, these things happen in the railroad." Upon cross-examination Farrell testified that that was the only baggage he received at the time; that before that time he had seen receipts of the transfer company; that "the baggage looked all right when I signed for it;" that "it seemed to be all together when I took it up." Upon redirect Farrell testified that when he brought the bags up from the baggage room he did not bang anything nor hit anything, that he handled the baggage very carefully; that he put it on the truck and put it on the elevator and went right up to the room; that the first time that he saw that the lock was broken was in the room, when Mrs. Smith called his attention to it. Upon recross Farrell testified that if he had

noticed that the lock was broken he would not have accepted the bags; that he had been employed as a baggageman for many years and had never had any difficulty before. Plaintiff introduced in evidence the following receipt, which Farrell admitted signing:

"Date 12/22/42

"Mrs. Al. Smith
"Sherman Hotel.

"Received Through

"Central Transfer Co.
 "127 North Wells Street
 "Telephones Dearborn 1955-3126

"From

M C R R

| | |
|----|-----------|
| "1 | trunk |
| "1 | Suit Case |

"In Good Order

"Trunks
"Packages
"Signed by M. Farrell"

The evidence shows that when the bag was turned over to Mrs. Smith the two front locks were broken off and the bag was held together by a lock on one side of it; that certain articles that had been placed in the bag by plaintiff or his wife were missing.

This appeal involves a question of fact, viz., Were the locks upon the bag broken off and the articles in question taken from the bag after it had been delivered to Farrell? Defendants contend that the receipt signed by Farrell is not, under the facts of this case, conclusive and irrebuttable proof that the bag came to the hotel in good order, with none of the contents missing. They cite the well known rule that parol evidence is admissible to explain, vary or contradict a receipt and they claim that the testimony of Farrell conclusively shows that he delivered the bag to plaintiff's room in exactly the

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"Self Case

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This appeal involves a question of fact, viz., were the locks upon the bag broken off and the articles in question taken from the bag after it had been delivered to Farrell? Defendants contend that the receipt signed by Farrell is not, under the facts of this case, conclusive and irrebuttable proof that the bag came to the hotel in good order, with none of the contents missing. They cite the well known rule that parol evidence is admissible to explain, vary or contradict a receipt and they claim that the testimony of Farrell conclusively shows that he delivered the bag to plaintiff's room in exactly the

same condition in which he received it from the transfer company. Plaintiff concedes that defendant had the right to contradict or explain the receipt. The trial court stated, in his decision, that there was only a factual issue involved in the decision of the case and found from the evidence that "the plaintiff has established that the bag was received in good condition by the Hotel Sherman * * * and was not delivered in good condition to the plaintiff and that there were various articles missing." If there had been any question raised in the trial as to the credibility of Farrell a different case would be presented to us, but the trial court stated: "He [Farrell] looks like an honest, hard-working, steady, conscientious man. I don't think we need any witness to testify as to his credibility," and the attorney for plaintiff thereupon saw fit to state, "I will testify that he is a good old fellow." Upon the oral argument in this court, plaintiff's counsel stated that he did not question the credibility or honesty of Farrell. Defendant contends that the court must have based his ruling upon the assumption that the receipt was conclusive evidence that Farrell received the bag when it was in good condition. Farrell's evidence, his credibility being admitted, shows clearly that he delivered the bag to plaintiff's room in the same condition that it was in when he received it from the transfer company. Plaintiff's counsel argues that, notwithstanding Farrell's testimony, the trial court had a right to assume that the bag was not adequately protected after Farrell received it and that some person other than Farrell might have broken the locks and taken from the bag the articles in question. This argument is based entirely upon mere conjecture, unsupported by any evidence. It is not without some significance that the transfer company had possession of the bag for three days, although it was apparent, when it took possession of the bag, that it belonged

same condition in which he received it from the transfer company. Plaintiff concedes that defendant had the right to contradict or explain the receipt. The trial court stated, in his decision, that there was only a factual issue involved in the decision of the case and found from the evidence that "the plaintiff has established that the bag was received in good condition by the Hotel Sherman * * * and was not delivered in good condition to the plaintiff and that there were various articles missing." If there had been any question raised in the trial as to the credibility of Farrell a different case would be presented to us, but the trial court stated: "He [Farrell] looks like an honest, hard-working, steady, conscientious man. I don't think we need any witness to testify as to his credibility," and the attorney for plaintiff thereupon saw fit to state, "I will testify that he is a good old fellow." Upon the oral argument in this court, plaintiff's counsel stated that he did not question the credibility or honesty of Farrell. Defendant contends that the court must have based his ruling upon the assumption that the receipt was conclusive evidence that Farrell received the bag when it was in good condition. Farrell's evidence, his credibility being admitted, shows clearly that he delivered the bag to plaintiff's room in the same condition that it was in when he received it from the transfer company. Plaintiff's counsel argues that, notwithstanding Farrell's testimony, the trial court had a right to assume that the bag was not adequately protected after Farrell received it and that some person other than Farrell might have broken the locks and taken from the bag the articles in question. This argument is based entirely upon mere conjecture, unsupported by any evidence. It is not without some significance that the transfer company had possession of the bag for three days, although it was apparent, when it took possession of the bag, that it belonged

-5-

to a person who was to be a guest, perhaps a very temporary one, of a hotel.

The trial court erred in not finding the issues for defendant, and the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

to a person who was to be a guest, perhaps a very temperate one, of a hotel.

The trial court erred in not finding the issues for defendant, and the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

42860

STYLIST, INC., a
corporation,

Appellant,

v.

O'CONNOR & GOLDBERG, a
corporation,

Appellee.

40
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

325 I.A. 238²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A forcible entry and detainer suit. In a trial before the court without a jury the issues were found for defendant and judgment was entered dismissing plaintiff's suit. Plaintiff appeals.

In its complaint plaintiff claims to be entitled to the possession of the store premises on the first floor of the building known as 2750 Milwaukee avenue, Chicago, under a lease from Sheldon Building Corporation to Sigmund E. and Fay Wintergreen for a ten-year term commencing July 1, 1935, and ending June 30, 1945; that said lease was, on September 1, 1940, with the consent of the lessor, assigned by the lessees to plaintiff; that O'Connor & Goldberg, defendant, unlawfully withholds possession of the premises from plaintiff, although it has made demand therefor, and it asks for judgment for possession of the premises. Attached to the complaint is a copy of the lease in question. Defendant's answer denies that plaintiff is entitled to possession of the premises; states that on August 29, 1941, the building in which the store in question is located was almost totally destroyed by fire and that the said store premises were totally destroyed and rendered untenable; that said store premises could not be and were not repaired or restored within sixty days and that the term created by said lease by its terms ceased and was determined; that plaintiff, having made no claim for possession thereof until July 1, 1942,

42866

STYLIST, INC., a
corporation,

Plaintiff,

v.

O'CONNOR & COLBERT, a
corporation,

Defendant.

COURT OF COMMON PLEAS
CITY OF CLEVELAND, OHIO

32314-238

MR. JUSTICE SCHEIDT DELIVERED THE OPINION OF THE COURT.

A forcible entry and detainer suit. In a trial before the court without a jury the issues were found for defendant and judgment was entered dismissing plaintiff's suit. Plaintiff appeals.

In the complaint plaintiff claims to be entitled to the possession of the store premises on the first floor of the building known as 2750 Milwaukee Avenue, Chicago, under a lease from Sheldon Building Corporation to Edward E. and Ray Wintergreen for a ten-year term commencing July 1, 1935, and ending June 30, 1945; that said lease was, on September 1, 1945, with the consent of the lessor, assigned by the lessor to plaintiff; that O'Connor & Colbert, defendant, unlawfully withholds possession of the premises from plaintiff, although it has made demand therefor, and it asks for judgment for possession of the premises. Attached to the complaint is a copy of the lease in question. Defendant's answer denies that plaintiff is entitled to possession of the premises; states that on August 22, 1941, the building in which the store in question is located was almost totally destroyed by fire and that the said store premises were totally destroyed and rendered untenable; that said store premises could not be and were not repaired or restored within sixty days and that the term created by said lease by its terms ceased and was determined; that plaintiff, having made no claim for possession thereof until July 1, 1945,

and having tendered no rent for said premises, has abandoned the same. Defendant denies that it unlawfully withholds possession of the said premises from plaintiff and states that it is now in lawful possession of the premises under a lease made between defendant and the Sheldon Building Corporation, the owner of the building in which the premises in question are located. Plaintiff's replication to defendant's answer denies that the building containing the premises in question was almost totally destroyed by fire; denies that the store premises demised by the lease to plaintiff were totally destroyed, but admits that said premises were rendered untenable; denies that the said store premises could not be repaired or restored within sixty days, but admits that they were not restored or repaired within sixty days; denies that the term created by the said lease ceased and was determined; denies that it made no claim for possession of the premises until July 1, 1942; denies that no rent was ever tendered or that plaintiff abandoned the premises; denies that a failure to make claim for possession prior to July 1, 1942, and a failure to tender rent for the premises, even if true, would, in the eyes of the law, constitute an abandonment of the premises; denies that defendant is now in lawful possession of the premises, and denies that any lease from the owner of the premises which is later in point of time and inferior to the prior lease to plaintiff could or did give lawful possession to defendant.

The premises in question consisted of a store, fifteen by ninety feet, in a building located at 2750 Milwaukee avenue, which contained eight stores, six on Milwaukee avenue and two on Spaulding avenue. On August 28, 1941, the building was gutted by a fire that lasted twelve hours and which rendered the premises occupied by plaintiff and the premises of all of the other tenants in the building untenable. The fire marshal in charge of the fire apparatus that worked on the fire testified that when the

and having tendered no rent for said premises, has abandoned the same. Defendant denies that it unlawfully withheld possession of the said premises from plaintiff and states that it is now in lawful possession of the premises under a lease made between defendant and the Sheldon Building Corporation, the owner of the building in which the premises in question are located. Plaintiff's replication to defendant's answer denies that the building containing the premises in question was almost totally destroyed by fire; denies that the store premises denied by the lease to plaintiff were totally destroyed, but admits that said premises were rendered untenable; denies that the said store premises could not be repaired or restored within sixty days, but admits that they were not restored or repaired within sixty days; denies that the term created by the said lease ceased and was determined; denies that it made no claim for possession of the premises until July 1, 1942; denies that no rent was ever tendered or that plaintiff abandoned the premises; denies that a failure to make claim for possession prior to July 1, 1942, and a failure to tender rent for the premises, even if true, would, in the eyes of the law, constitute an abandonment of the premises; denies that defendant is now in lawful possession of the premises and denies that any lease from the owner of the premises which is later in point of time and inferior to the prior lease to plaintiff could or did give lawful possession to defendant.

The premises in question consisted of a store, fifteen by ninety feet, in a building located at 2750 Milwaukee Avenue, which contained eight stores, six on Milwaukee Avenue and two on Springfield Avenue. On August 25, 1941, the building was gutted by a fire that lasted twelve hours and which rendered the premises occupied by plaintiff and the premises of all of the other tenants in the building untenable. The fire marshal in charge of the fire apparatus that worked on the fire testified that when the

fire was extinguished the building was quite a wreck; that part of the second floor of the building was pulled down entirely to insure the safety of people going by; that the building was approximately fifty to seventy-five per cent destroyed; that after the fire was extinguished there were eight feet of water in the basement and it took the fire department a couple of days to pump the water out. Plaintiff, in its replication to defendant's answer, in its brief, and in the oral argument, admitted that the premises in question were rendered untenable by the fire. The landlord did not start to rebuild the premises in question until sometime between November 5 and November 10, 1941, and the said premises were not rebuilt until March 15, 1942. The said premises were rented by the landlord to defendant on December 8, 1941, and defendant took possession of the premises in April, 1942, and operated a store therein. Plaintiff's claim for possession was made for the first time on July 8, 1942, by a demand made on defendant. Plaintiff did not at any time since the fire make a demand upon the landlord for possession of the premises, nor did it pay the latter any rent since the fire.

The sole question presented by this appeal is whether under clause Tenth of plaintiff's lease the term of that lease was terminated by the fire, it being agreed that the fire rendered the premises untenable and it being further agreed that the lessor did not repair the premises within sixty days. Clause Tenth reads as follows:

"Tenth: - In case said premises shall be rendered untenable by fire, explosion or other casualty, Lessor may, at his option, terminate this lease or repair said premises within sixty days. If Lessor does not repair said premises within said time, or the building containing said premises shall have been wholly destroyed, the term hereby created shall cease and determine."

fire was extinguished the building was quite a wreck; that part of the second floor of the building was pulled down entirely to insure the safety of people going by; that the building was approximately fifty to seventy-five per cent destroyed; that after the fire was extinguished there were eight feet of water in the basement and it took the fire department a couple of days to pump the water out. Plaintiff, in its replication to defendant's answer, in its brief, and in the oral argument, admitted that the premises in question were rendered untenable by the fire. The landlord did not start to rebuild the premises in question until sometime between November 7 and November 10, 1941, and the said premises were not rebuilt until March 15, 1942. The said premises were rented by the landlord to defendant on December 8, 1941, and defendant took possession of the premises in April, 1942, and operated a store therein. Plaintiff's claim for possession was made for the first time on July 8, 1942, by a demand made on defendant. Plaintiff did not at any time since the fire make a demand upon the landlord for possession of the premises, nor did it pay the latter any rent since the fire.

The sole question presented by this appeal is whether under clause Tenth of plaintiff's lease the term of that lease was terminated by the fire, it being agreed that the fire rendered the premises untenable and it being further agreed that the lessor did not repair the premises within sixty days. Clause Tenth reads as follows:

"Tenth: -- In case said premises shall be rendered untenable by fire, explosion or other casualty, lessor may, at his option, terminate this lease or repair said premises within sixty days. If lessor does not repair said premises within said time, or the building containing said premises shall have been wholly destroyed, the term hereby created shall cease and determine."

Plaintiff contends that that clause is for the benefit of the lessee and may be waived by it. Defendant contends that "the lease came to an end by its terms when the premises were rendered untenable by fire and were not repaired within sixty days." The meaning of the language of clause Tenth is free from any doubt, and defendant's interpretation of the clause is the correct one. That clause plainly provides that if the lessor does not repair the premises within sixty days the term shall cease and determine. The argument of plaintiff that the clause gave it an option to waive the sixty days' period is an idle one. No case is cited by plaintiff that supports its interpretation of clause Tenth. Indeed, Florsheim v. Dullaghan, 58 Ill. App. 626, cited by plaintiff, is an authority against its interpretation.

There is force in the contention of defendant that plaintiff, by its conduct in making no claim for the possession of the premises until July 8, 1942, when it made a demand for possession of the premises on defendant only, although defendant had taken possession of the rebuilt premises in April, 1942, and was operating a store therein; and by its conduct in tendering no rent for the premises at any time after the fire, had abandoned the premises, and that the instant proceeding is the result of an afterthought.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

Plaintiff contends that that clause is for the benefit of the lessee and may be waived by it. Defendant contends that "the lease came to an end by its terms when the premises were rendered untenable by fire and were not repaired within sixty days." The meaning of the language of clause Tenth is free from any doubt, and defendant's interpretation of the clause is the correct one. That clause plainly provides that if the lessor does not repair the premises within sixty days the term shall cease and determine. The argument of plaintiff that the clause gave it an option to waive the sixty days' period is an idle one. No case is cited by plaintiff that supports its interpretation of clause Tenth. Indeed, Johnson v. Dullaghan, 38 Ill. App. 3d, cited by plaintiff, is an authority against its interpretation.

There is force in the contention of defendant that plaintiff, by its conduct in making no claim for the possession of the premises until July 8, 1942, when it made a demand for possession of the premises on defendant only, although defendant had taken possession of the rebuilt premises in April, 1942, and was operating a store therein; and by its conduct in tendering no rent for the premises at any time after the fire, had abandoned the premises, and that the instant proceeding is the result of an afterthought.

The judgment of the Superior Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42869

B. H. MOLNER, Assignee,
Appellee,

v.

HELEN and JOHN ARENDT,
STANLEY L. BROWN et al.

STANLEY L. BROWN, for the use
of B. H. MOLNER, Assignee,

v.

PRESSED STEEL CAR COMPANY,
a corporation,
Appellant.

41
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

323 I.A. 289'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Pressed Steel Car Company, a corporation, garnishee, appeals from a judgment entered against it in a garnishment proceeding in favor of B. H. Molner, assignee, in the amount of \$85.

A proceeding was started in the Circuit court of Cook county against numerous defendants who were stockholders in the Ashland State Bank to enforce the superadded liability against them. One of the defendants was Stanley L. Brown. John J. Callahan was appointed receiver in the cause and on May 29, 1934, a decree was entered in favor of the receiver and against all of the defendants for the respective amounts due from them. Judgment was entered against Brown for \$3,000. On March 13, 1942, for a valuable consideration and pursuant to an order of the court, all of the judgments, including the one against Brown, were duly assigned to B. H. Molner by said receiver and the assignment is on file in that cause. On April 27, 1942, B. H. Molner, assignee, commenced proceedings in the Circuit court to revive by scire facias the judgments against certain of the defendants in the original proceedings, none of whom had paid the judgment against him. One of the defendants in the scire facias proceedings was Stanley L. Brown.

42869

B. H. MOHNER, assignee,
Appellee,

v.

HELM and JOHN ARNDT,
Appellants.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA

STANLEY L. BROWN, for the use
of B. H. MOHNER, assignee,

v.

PRESIDENT STEEL CAR COMPANY,
a corporation,
Appellant.

MR. JUSTICE SCOTT delivered the opinion of the court.

President Steel Car Company, a corporation, appellee, appeals from a judgment entered against it in a replevin proceeding in favor of B. H. Mohner, assignee, in the amount of \$25.

A proceeding was started in the circuit court of Cook county against numerous defendants who were stockholders in the Ashland State Bank to enforce the unpaid liability against them. One of the defendants was Stanley L. Brown. John J. Callahan was appointed receiver in the case and on May 29, 1934, a decree was entered in favor of the receiver and against all of the defendants for the respective amounts due from them. Judgment was entered against Brown for \$2,000. On March 13, 1942, for a valuable consideration and pursuant to an order of the court, all of the judgments, including the one against Brown, were duly assigned to B. H. Mohner by said receiver and the assignment is on file in that cause. On April 27, 1942, B. H. Mohner, assignee, commenced proceedings in the circuit court to revive by active facias the judgments against certain of the defendants in the original proceedings, none of whom had paid the judgment against him. One of the defendants in the active facias proceedings was Stanley L. Brown.

On December 10, 1942, the trial court entered an order reviving the decretal judgments entered in the original proceedings against Stanley L. Brown, defendant, and six other defendants. The judgment finds that on March 3, 1942, for a valuable consideration and pursuant to the order of the court the judgments against the respective stockholders in the original decrees were duly assigned by John J. Callahan, receiver, to B. H. Molner, "who is presently the owner thereof;" that all of the defendants to the scire facias proceeding, including Stanley L. Brown, were properly served with process in apt time and that all of said defendants were defaulted for failure to file appearances and pleadings in the cause. The judgment in the scire facias proceeding is still in full force and effect. Execution was issued December 22, 1942, against Brown, and the sheriff made a return that no property was found. Plaintiff then commenced the instant garnishment proceedings against Pressed Steel Car Company in an effort to reach property or money in its hands belonging to Brown. The garnishee filed a motion to quash and dismiss the proceedings, which was overruled. Upon a trial of the garnishment proceedings counsel for the garnishee stated that there was due Brown from the garnishee the sum of \$85 after deduction of Brown's exemptions at the time of the service of garnishee summons. Judgment was then entered against the garnishee for \$85.

The garnishee, appellant, contends that it is the duty of a garnishee to inquire into the legality of the judgment upon which garnishment is based, as garnishment cannot be brought upon a void judgment. This principle of law is conceded.

Appellant then calls attention to Section 22 of the Civil Practice Act, which provides that "the assignee and owner of a nonnegotiable chose in action * * * shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title;" and appellant contends that "the

On December 1, 1942, the trial court entered an order reviving the decretal judgments entered in the original proceedings against Stanley L. Brown, defendant, and six other defendants. The court found that on March 1, 1942, there was a valuable consideration and pursuant to the order of the court the judgments against the respective stockholders in the original Brown were duly satisfied by John J. Callahan, receiver, to W. O. Wolcott, who is presently the owner thereof; that all of the defendants to the said judgments, including Stanley L. Brown, were properly served with process in apt time and that all of said defendants were relieved for failure to file appearances and judgments in the case. The judgment in the said Callahan proceedings is still in full force and effect. Execution was issued December 2, 1942, against Brown, and the sheriff made a return that no property was found. Plaintiff then commenced the instant garnishment proceedings against Steel City Company in an effort to reach property or money in its hands belonging to Brown. The garnishee filed a motion to quash and dismiss the proceedings, which was overruled. Upon a trial of the garnishment proceedings counsel for the garnishee stated that there was due from the garnishee the sum of \$65 after deduction of Brown's obligations at the time of the service of garnishee summons. Judgment was then entered against the garnishee for \$65.

The garnishee, appellant, contends that it is the duty of a garnishee to inquire into the legality of the judgment upon which garnishment is based, as garnishment cannot be brought upon a void judgment. This principle of law is conceded.

Appellant then calls attention to Section 22 of the Civil Practice Act, which provides that "the attorney and owner of a nonnegotiable chose in action shall in his pleading on oath allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title;" and appellant contends that "the

affidavit filed [by Molner, assignee, in the scire facias proceedings] does not conform to the demands of the Practice Act in that it fails to allege that the plaintiff as assignee was at that time the 'ACTUAL BONA FIDE OWNER' of the chose in action sued on, thus depriving the court of jurisdiction to act. * * * It is clear that the enactment of the foregoing provision made it jurisdictional to properly plead ones rights when suing as assignee, herein the plaintiff utterly failed, the court acquired no jurisdiction, because of defective pleading and not having procured jurisdiction it could not have entered a valid judgment and erred in overruling garnishee's motion to quash and dismiss." (Italics ours.) It is difficult to believe that the argument that the judgment in the scire facias proceeding is void, "because of defective pleading," is seriously made. It is the settled law that a judgment rendered by a court having jurisdiction of the parties and subject matter is not subject to collateral attack so long as it stands in force. An apt case illustrating this principle of law is Walton v. Albers, 380 Ill. 423, wherein the receiver of the Basco bank, seeking to recover the superadded stockholders' liability, filed a complaint against the stockholders of the Harmony State Bank, including Frank Walton, who owned ten shares of stock when the bank closed. He was served with summons but he did not plead or answer and his default was entered and judgment by default was rendered against him for \$1,000. He did not prosecute an appeal from that judgment and later filed a "Bill of Review or Bill in the Nature of a Bill of Review, or Complaint under the Civil Practice act," in which he sought to collaterally attack the judgment rendered against him in the stockholders' liability suit on the ground that a certain contract was ultra vires and void and therefore the judgment against him in the stockholders' liability suit was likewise void. In its opinion the Supreme court stated (pp. 426, 427):

affidavit filed [by] [name], assignee, in the [state] [court] [proceeding] does not conform to the demands of the Practice Act in that it fails to allege that the plaintiff as assignee was at that time the "LEGAL OWNER" of the notes in question and, thus depriving the court of jurisdiction to act. It is clear that the enactment of the foregoing provision made it jurisdictional to properly plead ones that were assigned as assignee, herein the plaintiff utterly failed, the court accordingly no jurisdiction, pleading of defective pleading and not having procured jurisdiction it could not have entered a valid judgment and error in overruling the plaintiff's motion to quash and dismiss." (It is true.) It is difficult to believe that the argument that the judgment in the state [state] proceeding is void, "because of defective pleading," is seriously made. It is the settled law that a judgment rendered by a court having jurisdiction of the parties and subject matter is not subject to collateral attack so long as it stands in force. An apt case illustrating this principle of law is Wilton v. Wilton, 100 Ill. 423, wherein the receiver of the Banco Bank, seeking to recover the unpaid stockholders' liability, filed a complaint against the stockholders of the Harmony State Bank, including Frank Wilton, who owned ten shares of stock when the bank closed. He was served with summons but he did not plead or answer and his default was entered and judgment by default was rendered against him for \$1,000. He did not prosecute an appeal from that judgment and later filed a "Bill of Review or Bill in the Nature of a Bill of Review, or Complaint under the Civil Practice act," in which he sought to collaterally attack the judgment rendered against him in the stockholders' liability suit on the ground that a certain contract was ultra vires and void and therefore the judgment against him in the stockholders' liability suit was likewise void. In its opinion the Supreme court stated (p. 426, 427):

"We do not deem it necessary to decide whether the contract of April 3, 1929, was ultra vires and void. The judgment thereon still stands and cannot be here attacked. The decisive issue made by the pleadings is whether the judgment of May 10, 1939, for \$1000 against plaintiff is open to collateral attack by his bill of review or bill in the nature of a bill of review. Applicable legal principles are firmly established. The controlling issue is not whether the contract of April 3, 1929, or even the judgment note bearing the same date was void, but is, instead, whether the circuit court of Hancock county, on May 10, 1939, had jurisdiction of the subject matter, the particular proceeding, and the parties in the action in which judgment for \$1000 was rendered against plaintiff. If the circuit court had jurisdiction of the subject matter, the particular proceeding, and the parties, its order is immune to collateral attack. As applied to courts, jurisdiction is the legal authority to hear and determine controversies concerning certain subjects. Jurisdiction of the subject matter is the right to hear and determine causes of the general class to which the particular cause belongs. In its application to a certain controversy, jurisdiction is the right to hear and determine the controversy. (Woodward v. Ruel, 355 Ill. 163; O'Brien v. People ex rel. Kellogg Switchboard Co., 216 id. 354.) In Knaus v. Chicago Title and Trust Co., 365 Ill. 588, we said: 'Such jurisdiction is conferred by the constitution or by legislative enactment and does not depend upon the sufficiency of the bill of complaint in a particular case, the validity of the demand set forth therein, the regularity of the proceedings, or the correctness of the decision rendered.' A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in a proper proceeding, is not open to impeachment in any collateral action, except for fraud in its procurement, and even if the judgment is voidable and so illegal or defective that it would be set aside on a

We do not feel it necessary to decide whether the con-
tract of April 1, 1906, was void, voidable, or unenforceable. The judgment
thereon will stand as affirmed and cannot be further reviewed. The decision
is made by the plaintiff's motion for judgment of May 10,
1907, for 1000 against defendant is open to collateral attack
by his bill of review or bill in the nature of a bill of review.
Applicable legal principles are clearly established. The ques-
tioning issue is not whether the contract of April 1, 1906, or
even the judgment now bearing the same date was void, voidable,
instead, whether the plaintiff could enforce same, on May 10,
1907, had jurisdiction of the subject matter, the parties being
properly joined, and the parties in the action in which judgment was
rendered were entitled to relief. If the court found that
jurisdiction of the subject matter, the parties being properly
joined, its order is final as to collateral matters, is
applied to costs, jurisdiction is the local authority to make
and determine controversies concerning certain subjects. Juris-
diction of the subject matter is the right to hear and determine
causes of the general class to which the particular cause belongs.
In its application to a certain controversy, jurisdiction is the
right to hear and determine the controversy. (Cook v. Cook,
35 Ill. 103; O'Brien v. O'Brien, 111 Ill. 103; Chicago & North Western Ry. Co.
v. Chicago & North Western Ry. Co., 111 Ill. 103). To Gray v. Gray, 111 Ill. 103.
We said: "Such jurisdiction is conferred by the constitution
or by legislative enactment and does not depend upon the merits
of any of the bill of complaint in a particular case, the validity
of the contract and forth thereon, the regularity of the proceed-
ings, or the correctness of the decision rendered." A judgment
rendered by a court having jurisdiction of the parties and the
subject matter, unless reversed or annulled in a proper proceed-
ing, is not open to impeachment in any collateral action, except
for fraud in its procurement, and even if the judgment is voidable
and so illegal or defective that it would be set aside on a

proper direct application it is not subject to collateral attack so long as it stands in force. (Baker v. Brown, 372 Ill. 336; Brown v. Jacobs, 367 id. 545; People v. Sterling, 357 id. 354; Miller v. Rowan, 251 id. 344; Buckmaster v. Jackson, 3 Scam. 104.) The circuit court of Hancock county is a court of general and original jurisdiction. Admittedly, the circuit court has jurisdiction to entertain a representative suit to enforce the liability of bank stockholders. (Leonard v. Bye, 361 Ill. 185.) It is conceded that the court had jurisdiction of the person of the plaintiff, Walton. Since the circuit court had jurisdiction of the subject matter and of the parties and possessed the power to render the particular judgment, even though erroneous, it is not subject to the collateral attack levelled against it."

Here the trial court, in the scire facias proceedings, had jurisdiction of the subject matter and the record shows that it had jurisdiction of the person of Stanley L. Brown, and, therefore, the judgment in that case is not subject to the collateral attack made against it by the garnishee. However, in the instant case the record shows that for a valuable consideration and pursuant to the order of the court in the original proceedings the judgment or decree against Brown was duly assigned by the receiver, the officer of the court, to Molner, "who is presently the owner thereof," and the assignment by the receiver to Molner is a part of the record in the original proceeding. While it is entirely unnecessary to decide the point, we may state that the record clearly shows that Molner was an actual bona fide owner of the judgment against Brown when he commenced the scire facias proceedings.

We have had some difficulty in understanding the next contention raised by the garnishee, under the heading, "Every action to enforce payment of superadded liability on bank stock must be brought within one year after its accrual." The garnishee states that a garnishment proceeding is an action at law, and that

when the legislature used the words, "every action," it meant to include garnishment actions. While the garnishee does not state that it contends that the instant garnishment proceedings were barred by limitations, we may infer that it intended to so contend. No authorities are cited in support of the contention; indeed, no argument save that we have stated is advanced in support of it. The garnishment proceeding was not an action to enforce payment of superadded liability on bank stock but was merely an action to subject to the payment of the judgment against Brown in the scire facias proceedings property or effects of Brown in the hands of the garnishee. The original proceeding was the action to enforce payment of superadded liability on the bank stock. The scire facias proceeding was not a new suit but was merely a continuance of the old one, and the obligations of defendant Brown, as involved in the original suit, were disposed of by the judgment entered in that suit. The scire facias proceedings merely sought a revival of the former judgment in order to have execution on it. (Bank of Edwardsville v. Raffaele, 381 Ill. 486, 488, 489.) As long as the judgments revived in the scire facias proceedings are still in full force and remain unsatisfied, Molner, assignee, has the right to resort to garnishment proceedings.

The appellee has heretofore filed in this court a motion to dismiss the appeal and we reserved judgment on the same to hearing. The motion will be denied.

~~There is not the slightest merit in this appeal and the~~
judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

381 T. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 84

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42771

MYRTLE L. EILS,
Appellant,

v.

NANCY WORKS,
Appellee.

42
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

323 I.A. 289²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Myrtle L. Eils, who was a passenger in an automobile which was struck by a car owned and operated by defendant, Nancy Works, brought this action to recover damages for personal injuries sustained by her as the result of the alleged negligent operation of defendant's car. A verdict was returned finding defendant guilty and assessing plaintiff's damages at \$2,500. Defendant made no motion for a new trial. Plaintiff's written motion for a new trial was overruled. Judgment was entered on the verdict. Plaintiff appeals.

The errors assigned on this appeal for the reversal of the judgment are as follows:

"1. The damages awarded by the jury were grossly inadequate under the law and the manifest weight of the evidence.

"2. Instruction Number 25, given to the jury on behalf of the defendant, was improper, misleading and confusing to the jury, and caused the jury to misunderstand the law with respect to damages and to misconstrue the Court's instructions.

"3. The jury was confused as to the right of the plaintiff to recover for certain of her ailments by the erroneous exclusion of certain evidence in the deposition of Dr. Turnbull, and therefore such evidence was improperly excluded from their consideration in estimating the plaintiff's damages.

"4. (a) Counsel for defendant was guilty of improper and prejudicial conduct in the trial of the case, which resulted in minimizing the amount of recovery awarded in the jury's verdict.

"(b) The jury was prejudiced against the plaintiff and did not give proper consideration to the evidence of plaintiff's injuries and damages."

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

3231A 289

42871
MIRIAM L. BILLS, Appellant,
v.
NANCY MORRIS, Appellee.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Miriam L. Bills, who was a passenger in an automobile which was struck by a car owned and operated by defendant, Nancy Morris, brought this action to recover damages for personal injuries sustained by her as the result of the alleged negligent operation of defendant's car. A verdict was returned finding defendant guilty and assessing plaintiff's damages at \$2,500. Defendant made no motion for a new trial. Plaintiff's written motion for a new trial was overruled. Judgment was entered on the verdict. Plaintiff appeals.

The errors assigned on this appeal for the reversal of the judgment are as follows:

- "1. The damages awarded by the jury were grossly inadequate under the law and the weight of the evidence.
- "2. Instruction Number 25, given to the jury on behalf of the defendant, was improper, misleading and confusing to the jury, and caused the jury to misunderstand the law with respect to damages and to misapprehend the Court's instructions.
- "3. The jury was confused as to the right of the plaintiff to recover for certain of her ailments by the erroneous exclusion of certain evidence in the deposition of Dr. Turnbull, and therefore such evidence was improperly excluded from their consideration in estimating the plaintiff's damages.
- "4. (a) Counsel for defendant was guilty of improper and prejudicial conduct in the trial of the case, which resulted in minimizing the amount of recovery awarded in the jury's verdict.
- "(b) The jury was prejudiced against the plaintiff and did not give proper consideration to the evidence of plaintiff's injuries and damages."

The following grounds were enumerated in plaintiff's written motion for a new trial:

"1. The damages awarded by the jury are grossly inadequate under the law and the manifest weight of the evidence.

"2. The verdict is contrary to the law.

"3. The amount of said verdict is contrary to the manifest weight of the evidence.

"4. The jury failed to properly understand and construe the court's instructions on the question of plaintiff's damages.

"5. The jury was prejudiced against the plaintiff and did not give proper consideration to the evidence relating to plaintiff's injuries and damages."

It will be noted that the only grounds alleged here for the reversal of the judgment, which were included in plaintiff's written motion for a new trial, are that the damages awarded her by the jury were grossly inadequate and that "the jury was prejudiced against the plaintiff and did not give proper consideration to the evidence relating to plaintiff's injuries and damages." Since plaintiff's motion for a new trial did not specify any errors relating to instructions, exclusion of evidence or improper conduct of defendant's counsel and since error is assigned as to these matters for the first time in this court, these alleged grounds of error are not subject to review. The law was well settled under the former Practice Act (par. 57, chap. 110, Hurd's Rev. Stat. 1899) and is just as well settled under the Civil Practice Act (par. 192, chap. 110, Ill. Rev. Stat. 1941) that where a party files a written motion for a new trial specifying therein the grounds or reasons of such motion, he will be restricted in a court of review to the grounds or reasons specified in such written motion and will be deemed to have waived all other grounds or reasons for a new trial. (Illinois Central R. R. Co. v. Johnson, 191 Ill. 594; Erikson v. Ward, 266 Ill. 259; Ulbricht v. Western Coach Lines, 289 Ill. App. 164; In re Estate of Stahl, 305 Ill. App. 517.) Therefore plaintiff's contentions in respect to the

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written motion for a new trial:

"1. The damages awarded by the jury are grossly inadequate under the law and the manifest weight of the evidence.

"2. The verdict is contrary to the law.

"3. The amount of said verdict is contrary to the manifest weight of the evidence.

"4. The jury failed to properly understand and construe the court's instructions on the question of plaintiff's damages.

"5. The jury was prejudiced against the plaintiff and did not give proper consideration to the evidence relating to plaintiff's injuries and damages."

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alleged errors of the trial court in giving an improper instruction and in improperly excluding certain evidence and as to the alleged improper conduct of defendant's counsel must necessarily be disregarded.

Inasmuch as plaintiff's contention that the jury was prejudiced against her and did not give proper consideration to the evidence as to her injuries and damages is predicated entirely upon the alleged errors heretofore mentioned that the trial court improperly excluded certain evidence and improperly gave an instruction requested by defendant and that defendant's counsel was guilty of improper conduct, this contention must also be disregarded.

Can it be held that "the damages awarded by the jury were grossly inadequate under the law and the manifest weight of the evidence?" Certainly it cannot be so held as a matter of law in this case and since the amount of damages to be awarded is peculiarly a question of fact for the jury, a verdict will not be disturbed by a court of review unless it is clearly inadequate, indicating passion or prejudice on the part of the jury. (Metz v. Yellow Cab Co., 248 Ill. 609.) Even though we might entertain a doubt as to the correctness of the finding of the jury as to the amount of plaintiff's damages, still we would not be warranted in disturbing the verdict unless it appears to be clearly and palpably against the manifest weight of the evidence.

Plaintiff testified that she was taken from the scene of the accident to the Oak Park Hospital, where she received first aid treatment; that later on the same day she was removed in an ambulance to the Evanston Hospital, where she was examined and treated by Dr. Turnbull; that her head, the back of her neck, chest, arm and right leg up to her hip were injured in the accident; that her right leg was swollen, black and blue and full of pain; that she remained in the Evanston Hospital for twenty-two

alleged errors of the trial court in giving an improper instruction and in improperly excluding certain evidence and as to the alleged improper conduct of defendant's counsel must necessarily be disregarded.

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Can it be held that the damages awarded by the jury were grossly inadequate under the law and the weight of the evidence? Certainly it cannot be so held as a matter of law in this case and since the amount of damages to be awarded is peculiarly a question of fact for the jury, a verdict will not be disturbed by a court of review unless it is clearly inadequate, indicating passion or prejudice on the part of the jury. (Hett v. Yellow Cab Co., 248 Ill. 609.) Even though we might entertain a doubt as to the correctness of the finding of the jury as to the amount of plaintiff's damages, still we would not be warranted in disturbing the verdict unless it appears to be clearly and palpably against the manifest weight of the evidence.

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days after the accident; that during the entire time she was there she could not raise her head because of dizziness; that after a few weeks she was allowed to get up for a little while and walk around the room; that she was given injections to induce sleep and medicine during her entire stay at the hospital; that during the third week she was given physiotherapy or heat treatments upon her spine and chest; that Dr. Turnbull attended her at home every day after she left the hospital; that she had trouble with her vision - everything would disappear and she could not see anything for ten or fifteen minutes; that this occurred after she got home from the hospital and started walking around a little bit; that she would get dizzy spells and could not remain out of bed any length of time; that she continued to have pains in her chest; that her right leg swelled up badly if she remained out of bed for any length of time; that she returned to the Evanston Hospital in January 1941 and stayed there for five days; that at that time more physiotherapy treatments were given her; that she was then advised by her doctors to go down South and she went to Houston, Texas, by train; that while there she stayed in a hotel; that she had no medical attention while in Houston but had all of her medicines with her; that she had to stay in bed each day until noon and would have her meals sent to her room; that she just rested at the hotel; that she would sit on the porch in the sunshine a couple of times a day; that she remained at the hotel for six weeks; that while she was there she continued to have the same trouble as before - "pain, loss of sleep, nauseated and sick;" that when she returned to Chicago she was attended several times by Dr. Young, who gave her the same medicine as before; that she remained at home for about three weeks and then went back to Houston, Texas, for several weeks, where she "just rested

days after the accident; that during the entire time she was there she could not raise her head because of dizziness; that after a few weeks she was allowed to get up for a little while and walk around the room; that she was given injections to induce sleep and medicine during her entire stay at the hospital; that during the time she was at the hospital - everything - any or heat treatments upon her spine and arms; that Dr. Marshall attended her at home every day after she left the hospital; that she had trouble with her vision - everything would disappear and she could not see anything of her or fifteen minutes; that this occurred after she got home from the hospital and started walking around a little bit; that she would get dizzy spells and could not remain out of bed any length of time; that she continued to have pains in her chest; that her right leg swelled up daily if she remained out of bed for any length of time; that she returned to the Houston Hospital in January 1941 and stayed there for five days; that at that time more physiotherapy treatments were given her; that she was then advised by her doctors to go down South and she went to Houston, Texas, by train; that while there she stayed in a hotel; that she had no medical attention while in Houston but had all of her medicines with her; that she had to stay in bed every day until noon and would have her meals sent to her room; that she just rested at the hotel; that she would sit on the porch in the afternoon a couple of times a day; that she remained at the hotel for six weeks; that while she was there she continued to have the same trouble as before - "pain, loss of sleep, nauseated and sick; that when she returned to Chicago she was attended several times by Dr. Young, who gave her the same medicine as before; that she remained at home for about three weeks and then went back to Houston, Texas, for several weeks, where she "just rested

and sat out in the sun and got out in the air, and then would go back in the room and rest again;" that her condition did not improve any; that when she returned to Chicago after her second trip to Houston, she was attended by Dr. Smith, Dr. Young having gone into the military service; that she went to the Evanston Hospital again in March, 1942 upon the advice of Dr. Smith; that she remained at the hospital at that time for about three weeks; that she had more x-rays and a cardiogram taken and was given physiotherapy, diathermy and hot baths; that the condition of her right leg had not changed any; that after her third stay at the hospital she remained at her home; that during the six months preceding the trial Dr. Smith visited her in her home and when the weather permitted she went to his office in a cab; that she continued to take the same medicine; that she still has a lot of pain in her back and head, in her neck and chest and in her arms and leg; and that she never sleeps without a sleeping pill.

She further testified that she was 49 years old; that the accident happened during her period of menstruation; that same ceased abruptly and did not occur again until several months later; that since the accident she suffered from dizziness, pain around her heart and periods of collapse; that she had been going through the menopause since early in 1940; that prior to the accident she was very active physically, drove an automobile, took part in church activities and did everything a well person might do; that she has not driven an automobile since the accident; that she could not go out alone and did not go out of the house unless someone was with her; that she still had much pain, had to rest and use an electric pad on the back of her neck three or four hours a day; that her eyesight has been impaired and her left ear has bothered her a great deal; that it started to bother her during the first time she was at the Evanston Hospital; that she had attacks of nausea

and sat out in the sun and got out in the air, and then would go back in the room and rest again; that her condition did not improve any; that when she returned to Chicago after her second trip to Houston, she was attended by Dr. Smith, Dr. Young having gone into the military service; that she went to the Evanston Hospital again in March, 1942 upon the advice of Dr. Smith; that she remained at the hospital at that time for about three weeks; that she had more x-rays and a cardiogram taken and was given physiotherapy, diathermy and hot baths; that the condition of her right leg had not changed any; that after her third stay at the hospital she remained at her home; that during the six months preceding the trial Dr. Smith visited her in her home and when the weather permitted she went to his office in a cab; that she continued to take the same medicine; that she still has a lot of pain in her back and head, in her arms and about and in her arms and legs; and that she never sleeps without a sleeping pill.

She further testified that she was 45 years old; that the accident happened during her period of menstruation; that same ceased abruptly and did not occur again until several months later; that since the accident she suffered from dizziness, pain around her heart and periods of collapse; that she had been going through the menopause since early in 1940; that prior to the accident she was very active physically, drove an automobile, took part in church activities and did everything a well person might do; that she has not driven an automobile since the accident; that she could not go out alone and did not go out of the house unless someone was with her; that she still had much pain, had to rest and use an electric pad on the back of her neck three or four hours a day; that her eyesight has been impaired and her left ear has bothered her a great deal; that it started to bother her during the first time she was at the Evanston Hospital; that she had attacks of nausea

every day since the accident and that she did not suffer from nausea before the accident; that "her right leg has been painfully swollen for two years, ever since the accident;" that to relieve this condition she takes warm baths daily; that for almost a year after the accident she had to keep her right leg elevated; that she cannot sleep at night without sleeping medicine; that the medicines used by her are "triple bromides," "nimbutals," "phenobarbital," and "vitamin B-1;" that she cannot walk over two or three blocks without stopping to rest; and that she never took any sedatives before the accident but did take some theelin under her doctor's orders for the menopause.

The automobile collision that resulted in plaintiff's injuries occurred on November 21, 1940. The trial of this cause commenced on February 8, 1943. The only medical testimony presented in her behalf was that of Dr. Turnbull, who is in the service and testified by deposition. The last time that he examined or treated plaintiff was on January 22, 1941, about two months after her accident. There was no medical testimony as to plaintiff's condition from January 23, 1941 until the time of her trial. It should be stated that plaintiff testified that two other physicians treated her after Dr. Turnbull went into the service but they also went into the service later and were not available as witnesses.

Dr. Turnbull testified that when he examined plaintiff a few hours after the accident at the Evanston Hospital, her pulse, temperature and blood pressure were normal; that she complained of a headache, severe aching through the body and extreme discomfort in both thighs and the right leg and of blinding attacks and spots before her eyes; that she was nervous, tense and high strung; that she had a jagged wound of the scalp through to the skull about one and one-half inches in length; that this scalp wound did not require any sutures but was

every day since the accident and that she did not suffer from
nausea before the accident; that "her right leg has been pain-
fully swollen for two years, ever since the accident;" that to
relieve this condition she takes aspirin daily; that for
almost a year after the accident she had to keep her right leg
elevated; that she cannot sleep at night without sleeping
medicines; that the medicines used by her are "trichloraldehyde,"
"nitrobutals," "phenobarbital," and "vitamin B-1;" that she cannot
walk over two or three blocks without stopping to rest; and that
she never took any sedatives before the accident but did take
some insulin under her doctor's order for her diabetes.

The automobile collision that resulted in plaintiff's
injuries occurred on November 21, 1940. The trial of this cause
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service and testified by deposition. The last time that he
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tense and high strung; that she had a jagged wound of the scalp
through to the skull about one and one-half inches in length;
that this scalp wound did not require any sutures but was

"readily pulled together with adhesive and bandaged;" that she was kept in bed during her first ten days in the hospital and was then allowed to be up and about her room; that she was permitted to leave the hospital and go to her home on December 12, 1940, although she was still uncomfortable because of the dizziness, nausea, headaches, spots before her eyes and recurrent attacks of profuse perspiration; that she complained of severe pains in her back and required help to get up out of bed or from a chair; that plaintiff had been going through the menopause for sometime prior to the accident and it had been necessary for her "to use theelin for ovarian hormone during intermittent periods;" that his original diagnosis was that she had sustained concussion of the brain with severe laceration of the scalp and multiple bruises to the back, both thighs and lower legs with severe wrenching of the entire back; that complete x-ray examinations of her skull, the long bones of her legs and her spine were made both at the time of her admission to and just prior to her discharge from the hospital, which showed no evidence of fracture; and that she was suffering from "traumatic neurosis," which condition in his opinion "will be permanent."

From the very nature of plaintiff's testimony the jury may well have concluded that she exaggerated her injuries or that, if she did suffer from ailments of the character and to the extent she testified, they were attributable in large measure to her continued menopause, through which she had been going since sometime before her accident. It was undoubtedly difficult for the jury, as it is for us, to believe that all of plaintiff's claimed injuries resulted from the collision, when it is considered that her pulse, temperature and blood pressure were normal a few hours after the accident, that there were no fractures and that there were no objective symptoms, which would account for most of her prolonged ailments. The

"...physically pulled together with adhesive and bandaged; that she was kept in bed during her first two days in the hospital and was then allowed to be up and about her room; that she was permitted to leave the hospital and go to her home on December 12, 1941, although she was still manifesting the symptoms of the disease, namely, headaches, spots before her eyes and constant attacks of profuse perspiration; that she complained of severe pains in her back and weakness both to get in and out of bed or from a chair; that plaintiff had been living through the menopause for sometime prior to the accident and it was not necessary for her to use theelin for ovarian hormone during this period; that this original diagnosis was that she had sustained concussion of the brain with severe laceration of the scalp and multiple bruises to the back, both of which had healed with severe wrenching of the entire back; that a complete x-ray examination of her skull, the long bones of her legs and her spine were made both at the time of her admission to and just prior to her discharge from the hospital, which showed no evidence of fracture; and that she was suffering from "traumatic neuritis," which condition in his opinion "will be permanent."

From the very nature of plaintiff's testimony the jury may well have concluded that she exaggerated her injuries or that, if she did suffer from elements of the character and to the extent she testified, they were attributable in large measure to her continued neurosis, through which she had been going since sometime before her accident. It was undoubtedly difficult for the jury, as it is for us, to believe that all of plaintiff's claimed injuries resulted from the collision, when it is considered that her pulse, temperature and blood pressure were normal a few hours after the accident, that there were no fractures and that there were no objective symptoms, which would account for most of her prolonged ailments. The

last time Dr. Turnbull saw her was January 22, 1941, which was two months after the accident and more than two years before the trial. His deposition was taken on August 14, 1942, which was about nineteen months after he had last seen plaintiff. His testimony that he believed plaintiff's condition "will be permanent" should have been excluded since he had not seen or examined her since January 22, 1941. No mention was made in Dr. Turnbull's testimony that plaintiff ever complained to him of pains around her heart, swelling of her leg or injury to her eyes or ears. Plaintiff presented no medical proof of any impairment of her eyesight or of any ear trouble and there is no evidence in the record that she was ever treated therefor. Neither was any medical evidence produced as to her physical, mental or nervous condition at the time of the trial. There is no testimony in the record based upon reasonable medical certainty that there would be any permanent ill effects from the injuries received by plaintiff as a result of the accident.

The jurors saw plaintiff and heard her testify and were in a much better position than we to judge of her credibility. In Isley v. McClandish, 299 Ill. App. 564, the court said at pp. 568-569: "The clearest principle that can be derived from the cases on the subject of inadequate and excessive damages is that the courts are very slow to interfere with the judgment of the jury in such matters. *** The general rule is that a verdict will not be set aside and a new trial granted for inadequacy of damages unless it is clear that injustice has been done." There has been no showing that the jury was improperly influenced or that it acted through passion or prejudice and it does not appear that any injustice has been done plaintiff. We are impelled to hold that the verdict of the jury assessing plaintiff's damages at \$2,500 is not against the manifest weight of the evidence.

For the reasons stated herein the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

last that Dr. Turnbull saw her on January 22, 1941, which was
two months after the accident and more than two years before
the trial. His deposition was taken on August 14, 1942, which
was about nineteen months after he had last seen plaintiff. His
testimony that he believed plaintiff's condition "will be per-
manent" should have been excluded since he was not seen or
examined her since January 22, 1941. The question was asked in Dr.
Turnbull's testimony that plaintiff ever complained to him of
pain around her heart, swelling of her leg or difficulty in
eyes or ears. Plaintiff responded no more than a look of any in-
firmity or her eyesight or of any ear trouble and there is no
evidence in the record that she ever complained of anything.
Plaintiff was not seen or examined by any physician
until her nervous condition at the time of the trial. There is
no testimony in the record that she ever complained of anything
that there would be any permanent ill effects from the injuries
received by plaintiff as a result of the accident.
The jurors saw plaintiff and heard her testify and were
in a better position than we to judge of her credibility.
In Reilly v. Colquhoun, 233 Ill. App. 704, the court said at
pp. 700-702: "The clearest principle that can be derived from
the cases on the subject of independent and excessive damages is
that the courts are very slow to interfere with the judgment of
the jury in such matters. The general rule is that a ver-
dict will not be set aside and a new trial granted for inadequacy
of damages unless it is clear that injustice has been done." There
has been no showing that the jury was improperly influenced or
that it acted through passion or prejudice and it does not appear
that any injustice has been done plaintiff. We are inclined to
hold that the verdict of the jury awarding plaintiff's damages
is not against the manifest weight of the evidence.
For the reasons stated herein the judgment of the circuit
court of Cook county is affirmed.
JUDGMENT AFFIRMED.
Pratt, J., and Scamman, J., concur.

42844

JACOBY B. JACOBSEN,
Appellee,

v.

WALTER J. CUMMINGS, as Receiver,
etc., et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

43
A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

323 I.A. 290

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Jacoby B. Jacobsen, to recover damages for personal injuries alleged to have been sustained by reason of defendants' negligence. The cause was submitted to a jury which found defendants guilty and assessed plaintiff's damages at \$10,000. Defendants filed motions for a new trial and for judgment notwithstanding the verdict. Defendants' motion for a new trial was not passed upon by the trial court but judgment was entered in their favor notwithstanding the verdict. On a prior appeal from such judgment we filed an opinion on April 20, 1943 (Jacobsen v. Cummings, 318 Ill. App. 464), which concluded with the following judgment order: "The judgment of the superior court of Cook county is reversed and the cause is remanded for the disposition of defendants' motion for a new trial and for such further proceedings as are not inconsistent with the views herein expressed."

Pursuant to the opinion and judgment of this court its mandate issued and was filed in the Superior court. The mandate reads as follows:

"On this day came again the said parties, and the Court having diligently examined and inspected, as well the Record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the Record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is MANIFEST ERROR: THEREFORE, it is considered by the Court that for that Error, and others in the Record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be REMANDED to the Superior Court of Cook County for the disposition of defendants' motion for a new trial and for such other and further proceedings as to law and justice shall appertain, as

are not inconsistent with the views expressed in the opinion of this Court this day filed herein." (*Italics ours.*)

When defendants' motion for a new trial came on for hearing after remandment, the trial court construed the judgment order and the mandate of this court as a direction to overrule said motion for a new trial, refused to pass upon the merits of the motion or to permit any argument by defendants' counsel in support of the alleged grounds of error set forth therein and entered the following order:

"This cause coming on now to be heard on the motion for new trial heretofore filed in this cause by defendants, doing business as Chicago Surface Lines, said motion being now before the court and counsel for said defendants expressed his intention to argue each of the points set forth in said motion for new trial and stated to the court that the Appellate Court had remanded the cause to this court for the purpose of passing upon said motion for new trial; but the court being of the opinion that the cause was remanded by the Appellate Court for the specific purpose of overruling said motion for a new trial and entering judgment on the verdict, refuses to hear any argument on said motion for a new trial and it is therefore ordered that said motion for a new trial be and the same is hereby overruled and a new trial denied and that judgment be and the same is hereby entered upon the verdict in favor of plaintiff and against the defendants in the sum of \$10,000.00 and costs of suit, to which action and ruling of the court, defendants and each of them, by their counsel, then and there duly objected and excepted." (*Italics ours.*)

The instant appeal by defendants is from the foregoing judgment order and they contend that "the trial court erred in misconstruing the mandate of this court; in refusing to consider or pass upon the motion for a new trial on its merits; in overruling the motion for a new trial and in entering judgment upon the verdict without considering or passing upon the motion for new trial on its merits."

There is nothing contained in the opinion or judgment order of this court on the prior appeal or in the mandate issued pursuant thereto that is susceptible of the construction that the trial court was directed by said judgment order or mandate to overrule defendants' motion for a new trial and enter judgment on the verdict. This court had no jurisdiction to consider or determine de-

defendants' motion for a new trial or any questions presented thereby and we did not assume to exercise jurisdiction in that regard. Neither did we have nor assume to exercise jurisdiction to direct the trial court to overrule defendants' motion for a new trial and enter judgment on the verdict. The trial court had exclusive jurisdiction to pass upon the motion for a new trial and this court, having reversed the judgment in favor of defendants notwithstanding the verdict, remanded the cause with the specific direction to the trial court to dispose of defendants' alternative motion for a new trial.

The sole question presented on the former appeal was whether there was any evidence in the record which showed or tended to show that plaintiff was not guilty of contributory negligence and that defendants were guilty of negligence, which was the proximate cause of plaintiff's injuries or, in other words, whether plaintiff made out a prima facie case as to defendants' liability. In our opinion filed on the prior appeal the only evidence considered or discussed in determining that question was the testimony of plaintiff himself and our discussion of his testimony was necessarily confined exclusively to such question.

In the recent case of Goodrich v. Sprague, 376 Ill. 80, there was a verdict for the plaintiff for \$5,000. The defendant therein filed a motion for judgment notwithstanding the verdict and an alternative motion for a new trial. The trial court allowed the motion for judgment notwithstanding the verdict and entered judgment for the defendant. The alternative motion for a new trial was not considered. On appeal this court reversed the judgment entered by the trial court notwithstanding the verdict, passed upon and denied the alternative motion for a new trial and entered judgment on the verdict for the plaintiff for \$5,000. In reversing the judgment of this court the Supreme

... motion for a new trial or any other relief ...
... and we did not move to exercise jurisdiction in this ...
... relief. ... we have not asked to exercise jurisdiction ...
... to direct the trial court to exercise jurisdiction; motion for a ...
... new trial and other relief on the verdict. The trial court ...
... and alternative jurisdiction to pass upon the motion for a new ...
... trial. In this court, having reversed the judgment in favor of ...
... the defendant notwithstanding the verdict, ... the court ...
... the specific direction to the trial court to direct of ...
... entry of alternative motion for a new trial.

The sole question presented on the former appeal was ...
... whether there was any evidence in the record which would ...
... conclude to show that ... was not guilty of ...
... negligence and that defendant was guilty of negligence, ...
... was a ... of ... in ...
... words, whether ... and ...
... defendant's liability. In our opinion ... the ...
... the only evidence considered or discussed in ...
... question as the testimony of ... and ...
... of his testimony was necessarily limited exclusively to such ...
... question.

In the present case of ...
... there was a verdict for the plaintiff for \$5,000. The defendant ...
... (therein filed) a motion for judgment notwithstanding the verdict ...
... and an alternative motion for a new trial. The trial court ...
... allowed the motion for judgment notwithstanding the verdict and ...
... entered judgment for the defendant. The alternative motion for ...
... a new trial was not considered. On appeal this court reversed ...
... the judgment entered by the trial court notwithstanding the ...
... verdict, passed upon and denied the alternative motion for a ...
... new trial and entered judgment on the verdict for the plaintiff ...
... for \$5,000. In reversing the judgment of this court the ...

court said at pp. 86 and 87:

"In this case, notwithstanding an alternative motion for a new trial was filed with the motion for judgment notwithstanding the verdict, to be passed upon by the trial court in case the motion for judgment was overruled, the trial court passed only upon the motion for judgment, sustaining the same. The alternative motion was undisposed of. The office of Appellate Court is to review rulings, orders, or judgments of the court below, contained in the record, and matters not ruled upon by the inferior court are not subject to the consideration of the Appellate Court unless the lower court's failure to rule is made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the Appellate Court and not the merits of the matter upon which the trial court refuses to act. In other words, the Appellate Court's jurisdiction is appellate, and extends only to those matters in controversy which have been ruled upon by the trial court. There is nothing in the Civil Practice Act which denies to a party the right to file an alternative motion. *** The Appellate Court, in determining that plaintiff in error was not entitled to a new trial and in entering judgment on the verdict, was exercising original jurisdiction. It was not reviewing the decision of the nisi prius court. This, under our constitution, as we have seen, it had no jurisdiction to do, and the judgment entered for the defendant was erroneous. It necessarily follows that paragraph 3c of section 68, in so far as it purports to grant power to the Appellate Court to pass upon a motion for a new trial not passed on by the trial court and to enter judgment on the verdict of the jury, is unconstitutional as an attempt by legislation to confer original jurisdiction upon a reviewing court, prohibited by the constitution of this State. Had the trial court passed on both motions this question would not have arisen. The Appellate Court should have remanded the cause to the trial court to pass upon the motion for a new trial."

The Goodrich case is conclusive as to the proper procedure to be followed both by the Appellate court and the trial court, where a judgment notwithstanding the verdict is reversed and an alternative motion for a new trial remains undisposed of in the trial court.

While it is true that the trial court overruled defendants' motion for a new trial, it did not do so in the exercise of its own jurisdiction to pass upon such motion but rather because it misconstrued the judgment order and mandate of this court as a specific direction to deny the motion for a new trial and enter judgment on the verdict. Since the trial court's ruling on defendants' motion for a new trial was not made in the exercise of its own jurisdiction but was predicated entirely upon an assumed direction which was not contained in our judgment order on the

former appeal or in the mandate issued pursuant thereto and which this court had no jurisdiction to give, it must be held that defendants have been improperly deprived of their right under the law to a determination of their motion for a new trial on its merits. The jurisdiction to pass upon said motion resting solely in the trial court and it having refused to exercise its jurisdiction in respect thereto, this court is without jurisdiction now, just as it was on the prior appeal, to determine upon their merits the questions raised by defendants' motion for a new trial. As was said in the Goodrich case, "matters not ruled upon by the inferior court are not subject to the consideration of the Appellate Court unless the lower court's failure to rule is made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the Appellate Court and not the merits of the matter upon which the trial court refuses to act."

Error is assigned on this appeal on the refusal of the trial court to pass upon defendants' motion for a new trial as directed by the judgment order and mandate of this court and for the reasons stated herein the judgment order of the Superior court of Cook county is reversed and the cause is remanded with directions that the trial court pass upon defendants' motion for a new trial and that such other and further proceedings be had as may be appropriate and not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

42917

LOUIS ROSSIGNOL et al.,
Appellees,

v.

JOSEPHINE PRICE ELLIS et al.,
Appellants.

44
APPEAL FROM
COURT, CLACK COUNTY.

323 I.A. 291

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants, Virginia Price and Josephine Price Ellis, from an order denying their motion for a change of venue. The only question presented is whether said order is appealable.

The order denying defendants' motion for a change of venue was an interlocutory order and the only interlocutory orders from which an appeal may be taken are specified in section 78 of the Civil Practice Act (Par. 202, chap. 110, Ill. Rev. Stat. 1941), which provides as follows:

"Whenever an interlocutory order or decree is entered granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken therefrom to the appellate court."

In The People v. Fisher, 335 Ill. 403, it was said at p. 411: "The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment, decree. An order, judgment or decree is final only when it terminates the litigation between the parties on the merits of the case."

The order denying defendants' motion for a change of venue was merely interlocutory and since no statute authorized an appeal therefrom, the appeal will be dismissed.

Friend, F. J., and Scanlan, J., concur.

APPEAL DISMISSED.

THE FIRST EDITION OF THIS BOOK, WHICH WAS PUBLISHED IN 1841, WAS THE FIRST OF A SERIES OF BOOKS WHICH WERE PUBLISHED BY THE AMERICAN BOOK CONCERN, NEW YORK, IN 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 25

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1944

General No. 9488

Agency No. 4

I. L. VANCIL,
Plaintiff-Appellee,

-vs-

CHARLES J. WALTER, et al.,
Defendants.

CHARLES J. WALTER,
Appellant.

Appeal from
Circuit Court
Christian County,
Illinois.

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A

323 I.A. 291²

DADY, P.J.

This suit was brought by the appellee I. L. Vancil to collect a real estate broker's commission alleged to be due him from the defendant Charles J. Walter and his five co-defendants.

The case was tried before the trial court without a jury. Judgment for \$610.00 and costs was entered in favor of the plaintiff and against Charles J. Walter only. Judgment was also entered in favor of the other five defendants and against the plaintiff.

Charles J. Walter brings this appeal. Vancil assigns cross-error as to the entry of the judgment in favor of the co-defendants.

On November 27, 1942, the defendants, Charles J. Walter, Sophia K. Walter, Elizabeth M. Davis, John K. Walter, Paul H. Walter and Nell Anders, who were brothers and sisters, were the owners of a 160 acre farm, a 360 acre farm and a 10 acre timber tract, all in Christian County, which they had recently acquired by descent from their deceased parents. Charles J. Walter lived in the neighborhood of the farms. One sister lived in Taylorville, a brother lived in Champaign, and a brother and two sisters lived in Chicago.

About February 15, 1943, by written contract of that date, all of such heirs sold such 160 acre farm to one Grundy for \$20.00 per acre. One Markwell, who was also a real estate agent, was present at and took part in the closing of the deal.

No question is raised as to the sufficiency of the pleadings.

Charles J. Walter was the only co-tenant that ever talked to or had any communication with Vancil. Charles testified that he, Charles, had no authority from his co-tenants to sell, either written or oral, but he did not testify that he advised Vancil of such fact.

Costly

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On November 27, 1942, Vancil and Charles J. Walter met and had a conversation concerning the sale of the 160 acres in question, and Charles then told Vancil that the farm belonged to the Walter heirs and that he, Charles, was a part owner.

As to such conversation, Vancil testified that Charles told him that he, Charles, had authority to sell such 160 acre farm, that Vancil could sell it at \$100 per acre, and that he would pay Vancil 5% commission on the first \$10,000 and 2½% on the balance. As to such conversation, Charles testified that "I told him we had it to sell, and we would like to get it sold as soon as possible, but we really wanted to sell all of it at once if we could"; that Vancil said his charge would be 5% on the first \$10,000 and 2½% on the balance, and that he told Vancil he did not think the balance of the heirs would stand for that. Charles also testified that he then also told Vancil that the heirs had the farm for sale with several real estate brokers.

About December 10, 1942, Vancil talked with Grundy to induce him to buy the farm, and on December 11, 1942, Vancil, with Grundy and Mrs. Grundy, went to and walked over the farm. Grundy then signed and gave to Vancil a contract (by which Grundy agreed to pay \$90.00 ^{cash} per acre), and Grundy's check for \$1,000 on account of the purchase price.

On December 11th Vancil brought to Charles such contract and check so signed by Grundy, and gave the check to Charles, but Charles at once gave the check back to Vancil. Each of them then wrote a letter to Elizabeth M. Davis, and both letters and such contract were then put in an envelope addressed to her at her Chicago address. Vancil mailed such envelope and contents to Mrs. Davis. Vancil testified that he received no reply to such letter. Charles testified that he received a reply. Neither the content nor the substance of any such letter or reply appears in the record.

On November 17, 1934, Vancil met Charles J. Grady

and had a conversation concerning the sale of the 100 acres
in question, and Charles told Vancil that the farm belonged
to the latter being the son of Charles, was a joint owner.

As to such conversation, Vancil testified that Charles

told him that he, Grady, had authority to sell and 100 acres
there, that Vancil could sell it at \$100 per acre, that there was money
pay Vancil 25% commission on the first \$10,000 and 15% on the balance.
As to such conversation, Charles testified that he told him he was
it to sell, and he would like to get it sold as soon as possible,
but he really wanted to sell all of it at once if he could; that
Vancil told the speaker when he was on the farm \$1,000 and 25% on
the balance, and that he told Vancil he was not going to discuss
of the matter with anyone but Vancil. Charles also testified that
he then also told Vancil that the latter was the father of his wife
several real estate brokers.

About December 10, 1934, Vancil talked with Grady

he induced him to buy the farm, and on December 11, 1934, Vancil
with Grady and Mrs. Grady, went to the latter's home and
Grady then signed and gave to Vancil a contract of which Grady
agreed to pay \$20,000 for the farm, and Grady's check for \$1,000 on
account of the purchase price.

On December 11th Vancil brought to Grady's home and

street and check as signed by Grady, and gave the check to Grady,
but Charles at once gave the check back to Vancil. Each of them
then wrote a letter to Elizabeth A. Davis, the post mistress and
such copies of were then put in envelopes addressed to her at her
Chicago address. Vancil mailed such envelopes and contents to Mrs.
Davis. Vancil testified that he received no reply to such letter.
Charles testified that he received a reply. Whether the contents
nor the substance of any such letter or reply appears in the record.

About December 15th Vancil and Charles had another meeting. Vancil testified that Charles then said he was willing to accept the offer. They both agree that Charles, in the presence of Vancil, then telephoned to Mrs. Anders in Chicago. Charles testified that in such 'phone conversation he asked Mrs. Anders if they had considered this offer, and that she said they would have to have a meeting before they decided anything. Charles says the meeting between the brothers and sisters took place, but that he was not present, and that afterwards the brothers and sisters said they would not accept the offer. He further testified that he and Vancil "worked together trying to get" the brothers and sisters to agree to take \$90.00 an acre,--evidently meaning by such telephone conversation of Charles.

About the last of December Charles mailed the contract back to Vancil and Vancil then returned the check to Grundy.

"In February" Vancil again talked with Grundy about purchasing the farm, and Grundy then gave Vancil a new check for \$1,000. In February, Vancil brought such new check, together with the same contract to ^{Charles} ~~the Charles~~ ~~here~~, but Charles refused to accept either the check or contract. Vancil testified that Charles then told him to get \$5.00 an acre more and maybe they would consider it. Charles testified that he told Vancil they wanted about \$100 an acre, but "they might take \$95.00, they won't take no less I don't think." Vancil testified he learned about a week later that the farm was sold to Grundy for \$90.00 an acre.

Grundy and Markwell first became acquainted with one another "sometime" in February, 1943.

Grundy testified that at that time Markwell told him he had authority to sell the farm and "asked me if the offer I made Vancil was still good," and then left. Markwell testified

About December 1931 Vancil and Charles had another

meeting. Vancil testified that Charles told him he was willing to accept the offer. They both agreed that Charles, in the presence of Vancil, then telephoned to Mrs. Andersen in Chicago. Charles testified that in such a phone conversation he asked Mrs. Andersen if they had considered this offer, and that she said they would have to have a meeting before they decided anything. Charles says the meeting between the brothers and sisters took place, but that he was not present, and that afterwards the brothers and sisters said they would not accept the offer. He further testified that he and Vancil "worked together trying to get" the brothers and sisters to agree to take \$50.00 a year, which he testified meaning by such telephone conversation of Charles.

At the last of December Charles called the contract back to Vancil and Vancil then turned the check to Grundy.

"In February" Vancil again talked with Grundy about purchasing the farm, and Grundy then gave Vancil a new check for \$1,000. In February, Vancil brought such new check, together with the same contract to ~~Charles~~ ^{Charles}, but Charles refused to accept either the check or contract. Vancil testified that Charles then told him to get \$5.00 an acre more, and says they would consider it. Charles testified that he told Vancil they wanted about \$100 an acre, and Vancil testified that he would take no less. I don't think. Vancil testified he learned about a week later that the farm was sold to Grundy for \$90.00 an acre.

Grundy and Vancil first became acquainted with one

another "sometime" in February, 1931.

Grundy testified that at that time Vancil told him he had authority to sell the farm and "asked me if the offer I made Vancil was still good," and then left. Vancil testified

that on such occasion he told Grundy he had the farm for sale, and asked Grundy if he would pay \$100 per acre, and that Grundy said he would not pay over \$90.00. It does not appear from whom Markwell received the information that Grundy had made an offer to Vancil.

Grundy further testified that after such conversation with Markwell he, Grundy, then saw Vancil and told him about the conversation, and that the next day Vancil asked him if he would still "give that, he would * * * present the check again," and he then gave Vancil the second \$1,000 check and the same contract and that later in February Vancil returned the check to him.

Grundy further testified that he had the purchase of the farm under consideration continuously from the time he first talked to Vancil until the deal was closed.

Markwell testified that after he had such talk in February with Grundy he contacted the rest of the heirs to see whether by selling the whole estate he could do it that way or not, and that thereafter he again saw Grundy and Grundy signed the contract of purchase dated February 14, 1943.

Vancil testified that at his first meeting with Charles, and in the presence of Charles, he prepared a pencil memoranda on a broker's printed contract form blank, inserting therein the description of the 160 acres in question, the sale price and the rate of commission. Vancil further testified that he, Vancil attached thereto the signature of Charles, in the presence of Charles, and then gave a copy thereof to Charles, Charles testified that he never saw such instrument and never received a copy thereof. The instrument stated that Charles gave Vancil the right to sell such property.

Appellant contends that the trial court erred in admitting such instrument in evidence over his objection. It is

There is no doubt that the Commission is a body of men who are not only intelligent but also very honest. It is not a body of men who are not only intelligent but also very honest. It is not a body of men who are not only intelligent but also very honest.

During the past few years, the Commission has been very active in its work. It has been very active in its work. It has been very active in its work. It has been very active in its work. It has been very active in its work.

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our opinion that such instrument was properly admitted in evidence.
(See Monroe v. Snow, 131 Ill. 126.)

Appellant next contends that there was no contract of employment between Vancil and appellant. In our opinion there is no merit to this contention. Appellant made an offer which Vancil accepted and acted upon. No particular form of words was necessary to constitute such a contract. (See Purgett v. Weinrank, 219 Ill. App. 28, Vossler v. Earle, 273 Ill. 367.)

The next and principal question presented is whether there was sufficient evidence to justify the trial court in finding that Vancil was the procuring cause of the sale and therefore entitled to judgment against Charles.

In 8 Amer. Juris, P. 1088, it is said: "When a broker is the procuring cause of a sale, is a question of considerable difficulty; in the main it is a question of fact for the jury * * *." (See O'Brien v. Newhouse, 196 Ill. App. 39) Where a broker is employed by a seller to find a purchaser and through his efforts the seller is brought into communication with the purchaser, the broker cannot be deprived of his commissions because the seller takes up and completes the negotiations himself or through another broker, (Rigdon v. More, 226 Ill. 382, 387; Rees v. Spruance, 45 Ill. 303⁸) even though the seller accepts the purchaser under different terms, prices or conditions. (Adams v. Decker, 34 Ill. App. 17, 20; Francisco v. Coleman, 230 Ill. App. 465; Day v. Porter, 60 Ill. App. 366, 369.)

In determining the liability of Charles only, we believe the question may properly be considered as though he were the only defendant. The trial court had the right to and evidently did believe the testimony of Vancil that Charles told him at their

and opinion that the testimony was properly admitted in evidence.
(See General's Report, Vol. III, 100.)

General's Report, Vol. III, 100. There was no material
discrepancy between the two reports. In fact, the two
reports were in substantial agreement. The only material
discrepancy was in the statement of the witness that he
saw the body of the deceased on the ground. This statement
was not contradicted by the other witnesses. (See General's
Report, Vol. III, 100.)

The only material discrepancy between the two reports
was in the statement of the witness that he saw the body
of the deceased on the ground. This statement was not
contradicted by the other witnesses. (See General's
Report, Vol. III, 100.)

In the report of the witness, D. D. D., it is stated that
he saw the body of the deceased on the ground. This
statement was not contradicted by the other witnesses.
(See General's Report, Vol. III, 100.)

The only material discrepancy between the two reports
was in the statement of the witness that he saw the body
of the deceased on the ground. This statement was not
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contradicted by the other witnesses. (See General's
Report, Vol. III, 100.)

first meeting that he, Charles, had authority to authorize the sale of the 160 acres. If Charles, in fact, had no such authority, then he bound himself personally by the contract of employment with Vancil. (See Frankland v. Johnson, 147 Ill. 520.)

So far as the purchaser Grundy was concerned, Vancil found and produced Grundy, and by ^{so} doing ~~so~~ found and produced a prospective purchaser who was at all times ready, willing and able to pay the \$90.00 per acre cash at which the farm was finally sold to him, and who had the purchase under consideration constantly from the time he first talked to Vancil until the deal was closed. The record does not show that Markwell was ever on the farm with Grundy, and does not show that Markwell took any part in persuading Grundy to buy.

So far as Charles was concerned, Vancil twice produced the Grundy offer to Charles. Charles did not deny Vancil's testimony that about December 15, Charles told Vancil that he was willing to accept the Grundy offer of \$90.00 per acre. Evidently it was Vancil, and not Markwell, who persuaded Charles to accept the lesser price. Charles did nothing to protect Vancil, and evidently Vancil's inability to consummate the deal was the result of Charles' lack of authorization by his co-tenants to sell.

While it appears that when the sale to Grundy was finally consummated, Markwell was instrumental in settling controversies between the heirs, by which settlement Charles contracted to buy the 260 acres, Markwell contracted to buy the ten acre tract and pay therefor out of his commissions, and a disputed lumber bill was adjusted, these other transactions did not concern Vancil or affect his rights, but evidently helped to persuade the other five co-tenants to join in the sale to Grundy.

(See Exhibit 1, Document, 101-111, 100.)

co-terminus to join in the line to ground.

The only other contention of the appellant is that if liable, judgment should have been entered against him for only one-sixth of the commission as he owned only one-sixth of the lands sold. With this contention we do not agree. (See Frankland v. Johnson, 147 Ill. 520, supra.)

It is our opinion that the judgment against the appellant Charles J. Walter should be affirmed.

It is also our opinion that there is no merit to the cross error assigned.

Affirmed.

The only other consideration of the applicant is that

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323 144. App.

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BENJAMIN B. MORRIS,
Appellant,
v.
COLUMBIA APARTMENTS CORPORATION,
a Corporation, et al.,
Appellees.

322 I.A. 292

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

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MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Benjamin B. Morris seeks to reverse a decree of the Superior court of Cook county entered November 23, 1942, denying his motion to strike the answers and counterclaim of certain defendants and for the entry of a decree in his favor sustaining the motion of the defendants to dismiss the complaint for want of equity and allowing them to withdraw their counterclaim without prejudice.

The record discloses that plaintiff, the owner of five shares of the 1,000 shares of the capital stock of the Columbia Apartments Corporation, on September 23, 1942, filed his complaint in chancery praying that defendant, Chicago Title & Trust Co. be enjoined from paying out money which had been deposited with it in escrow as part of the purchase price for an apartment hotel owned by defendant, Columbia Apartments Corporation, and to set aside the warrahty deed and trust deeds conveying the property, etc. October 21, 1942, an order was entered on motion of counsel for the Apartments Corporation to strike the complaint for failure to allege the number of shares of stock owned by plaintiff. The motion was sustained and plaintiff was given leave to amend his complaint on its face instanter by inserting the number of his certificate and the number of shares owned by him. The amendment

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FROM
JULIUS R. ROSEN
COURT HOUSE

JULIUS R. ROSEN
v.
COLUMBIA APARTMENTS CORPORATION,
a corporation, et al.,
A Petitioner.

BY THE SINGING JUDGE OF COURT IN LIVERED THE JUDGE OF THE COURT.

By this appeal Benjamin S. Rosen seeks to reverse a decree of the Superior Court of Cook County rendered November 20, 1942, denying his action to strike the answers and counterclaims of certain defendants and for the entry of a decree in his favor sustaining the motion of the defendants to dismiss the complaint for want of equity and allowing them to withdraw their counter-claim without prejudice.

The record discloses that plaintiff, the owner of five shares of the 1,000 shares of the capital stock of the Columbia Apartments Corporation, on September 22, 1942, filed his complaint in chambers praying that defendant, Chicago Title & Trust Co., be enjoined from paying out money which had been deposited with it in escrow as part of the purchase price for an apartment hotel owned by defendant, Columbia Apartments Corporation, and to set aside the warranty deed and trust deeds conveying the property, etc. On October 21, 1942, an order was entered on motion of counsel for the Apartments Corporation to strike the complaint for failure to allege the number of shares of stock owned by plaintiff. The motion was sustained and plaintiff was given leave to amend his complaint on its face inasmuch as inserting the number of his certificate and the number of shares owned by him. The defendant

2.

was accordingly made and on November 6, 1942, the Chicago Title & Trust Company, Trustee, the Sherlake Manor, Inc., et al., each filed its separate answer and on November 9, the Columbia Apartments, Inc., and other defendants filed their answer and counterclaim. November 9, plaintiff by leave of court, amended his complaint by making an additional Party defendant and it was further ordered that the answers filed stand to the complaint as amended. Another order was entered the same day that plaintiff answer the counterclaim within 10 days and the cause was set for hearing November 24, 1942. November 18, following, plaintiff filed his motion to strike the answers and counterclaim of the Columbia Apartments Corporation and others, specifying a number of grounds. November 20, an order was entered on motion of plaintiff's counsel setting plaintiff's motion to strike for November 23, and on November 23, the order or decree appealed from was entered. It recites that the matter came on to be heard upon plaintiff's motion to strike the answer and counterclaim of the Columbia Apartments Corporation and other defendants "and for the entry of a decree in favor of plaintiff, and upon the motion of the defendants and counterclaimants to strike and dismiss the complaint *** for insufficiency in law and in fact." That all parties appeared in open court and the court, having read the complaint and answer and after hearing the argument of counsel, found that the complaint failed "to state a cause of action, and is insufficient in law." And it was ordered "that plaintiff's motion to strike the answer and counterclaim *** for the entry of a decree in favor of plaintiff,^{be} and it is hereby denied." It was further ordered: "that the motion of the defendants, Columbia Apartments Corporation, [and others] *** to strike and dismiss the complaint *** be and it is herewith sustained, and the complaint is hereby stricken and the cause *** forthwith dismissed for want of equity." Leave was given to dismiss the counterclaim without prejudice.

The record further discloses that on July 16, 1942, defendant

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APPEAL FROM
COURT IN CHANCERY
DOCK HOUSE

and accordingly was and on
a first hearing, the court
filed the answers and
the court then ordered
the parties to file their
answers to the answers
made by the defendant
corporation.

On November 12, 1943, the court ordered delivery of the court
to the court and the court ordered the court to reverse a decree
of the court of Cook County entered November 23, 1943,
relating to the entry of a decree in the favor
of the defendant corporation to strike the answers and counterclaims of
the plaintiff and allowing them to withdraw their counter-
claims of the plaintiff's prejudice.
For the reasons set forth in the complaint, the owner of five shares
of the defendant shares of the capital stock of the Columbia Trust
Company, Inc., on September 23, 1943, filed his complaint in
the court praying that defendant, Chicago Title & Trust Co., be en-
joined from paying out money which had been deposited with it in
full or a part of the purchase price for an apartment hotel owned
by defendant, Columbia Apartments Corporation, and to set aside
the entry and trust deeds conveying the property, etc.
On October 21, 1943, an order was entered on motion of counsel for
the Apartments Corporation to strike the complaint for failure
to allege the number of shares of stock owned by plaintiff. The
motion was sustained and plaintiff was given leave to amend his
complaint on its face insofar as inserting the number of his
certificate and the number of shares owned by him. The defendant

3.

Milton S. Yondorf, as president of defendant Columbia Apartments Corporation sent a notice in writing to the stockholders that an offer of \$60,000 had been made by Leah Lukin to purchase the real estate belonging to the Columbia Apartments Corporation, which was a three-story and basement brick apartment building containing 42 apartments all steam heated with mechanical refrigeration, gas ranges, kitchen cabinets, etc., which was the only property owned by the corporation and that a special meeting of the shareholders would be held on Tuesday, August 4, 1942, at 2 o'clock in the afternoon, for the purpose of considering and accepting or rejecting the offer and providing for the distribution of the proceeds of the sale and for the dissolution of the corporation. The notice also stated that the offer of Mrs. Lukin to purchase the property was conditioned upon the cancellation of the existing lease of the apartment building; that the corporation would allow her a credit for "the cancellation bonus of \$2,000;" that the prepaid rental of \$2,600 was also to be allowed her and that in the event the sale was consummated, the regular real estate board commission amounting to \$2,800 would be paid, one-half to Robert R. Sher and one-half to defendant Yondorf & Co., Inc. The notice further stated that the special meeting of the shareholders was called pursuant to the action of the board of directors taken at a special meeting July 14, 1942. That the fair market value of the property was \$52,500. The notice further stated that the offer was subject to the acceptance by the holders of at least $\frac{2}{3}$ of the stock of the corporation "and subject to any action being taken by any dissenting shareholder under Section. 73 of 'The Business Corporation Act' within twenty days thereafter;" that at the special meeting of the board of directors held July 14, 1942, to consider the offer a resolution was adopted "to submit said offer to the shareholders without recommendation for their acceptance or rejection; also, in the event the holders of at least $\frac{2}{3}$ of the shares issued and outstanding accept said offer, after the sale is

[illegible]

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consummated, to distribute the net sum on hand, less reserve for possible Federal taxes, prorata to the shareholders and then to dissolve the corporation." Other information was given in the notice.

It further appears, as stated by counsel for plaintiff, that Yondorf, as president at the time he mailed the notice to the shareholders, enclosed a proxy running to himself and to Samuel J. Ascher for the purpose of passing on the sale of the building and the acceptance of Mrs. Lukin's bid of \$60,000.

The board of directors was composed of 5 persons, including plaintiff, and the resolution above mentioned, was passed by the votes of the 4, plaintiff voting against it.

Counsel for plaintiff says that "The motion of the plaintiff to strike the answers of the several defendants and for a decree in his favor should have been sustained," and in support of this cites §§33 and 72, pars. 157.33 and 157.72, (Ill. Rev. Stat. 1943, ch.32) and other authorities. Counsel says that §33 provides: "the business and affairs of a corporation shall be managed by a board of directors," and that §72 "which deals with the sale of all the assets of a corporation" provides that

"The board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge, or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting. ***

"After such authorization by a vote of shareholders, the board of directors nevertheless, in its discretion, may abandon such sale, lease, exchange, mortgage, pledge or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders." And from these statutory provisions counsel argues that: "the statute contemplated that before the authorization of such a sale by a vote of the shareholders the directors must adopt a resolution recommending

It further appears, in relation to the above, that the above is a copy of a letter from the above to the above, dated the 1st of January, 1900, and that the above is a copy of a letter from the above to the above, dated the 1st of January, 1900.

...the Board of Directors has decided to make an
...and the President has been elected
...the Board of Directors has decided to make an
...and the President has been elected

[illegible]

The Board of Directors shall have a full and complete knowledge of the affairs of the company, and shall be responsible for the management of the same. The Board shall also have the power to elect and remove the officers and directors of the company, and to fix their salaries. The Board shall also have the power to declare dividends, and to issue bonds and stock of the company. The Board shall also have the power to enter into contracts, and to execute all other business that may be necessary for the proper management of the company.

5.

the sale to them. It will not suffice if, without such a recommendation, the shareholders vote upon the question and nevertheless authorize the sale. In this latter event the officers of the corporation will not be justified in carrying out the wishes of the shareholders without regard to those of the directors." We are unable to agree with this contention.

At the adjourned meeting of the shareholders which was held August 13, 1942, the offer of Mrs. Lukin to purchase the property for \$60,000 was accepted by an affirmative vote of more than 690 votes and 25 voted against. Those voting to accept the proposition to sell the property and dissolve the corporation were more than 2/3 of the 1,000 shares of the corporation. After this acceptance a warranty deed conveying the real estate to Mr. Lukin was executed and another company, viz., Sherlake Manor, Inc., was organized and the title conveyed by Mrs. Lukin to it. Trust deeds were executed to secure indebtedness to obtain the money in carrying out the deal but plaintiff did nothing until he filed his bill September 23, 1942, which was more than 20 days from August 13, 1942, the date the shareholders accepted the offer and authorized the sale of the building.

Counsel for the Columbia Apartments and other defendants say that such delay by virtue of §73, par. 157.73 (Ill. Rev. Stat. 1943, ch. 32) barred plaintiff from questioning the sale of the property. That section provides: "In the event that a sale or exchange of all or substantially all of the property and assets of a corporation otherwise than in the usual and regular course of its business, is authorized by a vote of the shareholders of the corporation, any shareholder who shall not have voted in favor thereof may, within twenty days after the vote was taken, make written demand on the corporation for the payment to him of the fair value of his shares as of the day prior to the date on which the vote was taken authorizing the sale or exchange. Such demand shall state the

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number and class of the shares owned by such dissenting shareholder. Any shareholder failing to make demand within the twenty-day period shall be conclusively presumed to have consented to the sale or exchange and shall be bound by the terms thereof."

Counsel for the apartment building in their brief make reference 16 times to §73, which is one of the contentions on which they rely for the affirmance of the decree appealed from. But counsel for plaintiff in his reply brief of 30 pages makes no attempt to answer defendants' contention or to excuse his failure to comply with the provisions of §73. We think under the provisions of this section plaintiff is not in a position to complain that the sale was improperly made. Moreover we are of opinion that §72 of the Corporation Act does not require that the board of directors adopt a resolution recommending the acceptance of the offer to purchase in submitting the matter to the vote of the shareholders; that the provision of the statute is not mandatory but directory. But in any event there is no merit in plaintiff's contention because detailed information was given to the shareholders of the offer and they voted overwhelmingly in favor of accepting it and authorizing the sale. In these circumstances plaintiff ought not be heard to complain.

Plaintiff further contends that the court erred in dismissing his complaint for want of equity for the reason that it was improper to allow to the purchaser of the property, Lukin, credit for the \$2,000 for the cancellation of the lease; the \$2,600 which had been paid by the tenant to be applied on the last months of the rental term and the \$2,600 broker's fees to be paid, one-half to Sher and one-half to Yondorf & Co., Inc. That Yondorf was president of the defendant Columbia Apartments Corporation and that his interest was in conflict with the interest of the stockholders. These three items were specifically mentioned in the notice sent to the stockholders advising them of the offer of Mrs. Lukin to purchase the property for \$60,000. The stockholders were all specifically advised as to what was to be done

7.

in this respect. There was no concealment and after being so advised, more than 2/3 of them voted and directed the directors to accept the offer. There was no better offer made for the property and there is no allegation that any better offer would be made. In these circumstances we think there was no error of which plaintiff can complain.

A further point is made that the court erred in entering an order immediately after the order or decree appealed from was entered denying plaintiff's motion for leave to file replies to the answer. And counsel for plaintiff contends that plaintiff should have been granted such leave. The difficulty with this contention is that the suit having been properly dismissed, there was nothing to which plaintiff could reply.

Plaintiff also contends that the court erred in denying his motion to strike the counterclaim filed by certain defendants. The prayer of the counterclaim was that the action taken by the board of directors and shareholders of the Apartments Corporation be ratified and confirmed. Since we have above held that the action of the board and the shareholders selling the property was warranted, there apparently, was no further reason for considering the counterclaim.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, J., and Metchett, J., concur.

in the present. There was no movement in the
direction of the new order and the old order was
still the same. There was no change in the
old order. It was the same as before. The
old order was the same as before. The
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The present order is the same as the old order.
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323 I.A. 293

HARRY K. JONES,
Appellee,

v.

NINA A. POOL, Individually and
as Trustee under the Last Will
and Testament of Sarah E. Jones,
Deceased,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, individually and as trustee under the last will and testament of Sarah E. Jones, deceased, seeks to reverse a decree entered by the Circuit court of Cook county whereby she was decreed to pay plaintiff, her brother, \$2,418.04.

The record discloses that Sarah E. Jones, the grandmother of plaintiff and defendant, died testate in 1926 and her will was admitted to probate February 4, 1927 by the County court of Piatt county, where Mrs. Jones resided at the time of her death. By the terms of the will certain property was devised to plaintiff and to defendant and it is the contention of plaintiff that he did not receive his just share from his sister who was the trustee named in the will. The suit was brought for an accounting and that defendant be removed as trustee.

Defendant filed a counterclaim seeking to recover from plaintiff one-half the amount she had expended for the support of their mother - \$2,250 and also \$240 for board and lodging furnished plaintiff. The cause was referred to a master in chancery who took the evidence and made up his report finding that plaintiff was entitled to \$2,418.04 from defendant but that defendant should not be removed as trustee and that defendant was not entitled to recover under her counterclaim. Objections were overruled to the

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42880

Plaintiff, individually and as Trustee under the last will and testament of Sarah E. Jones, Deceased,
vs.
Defendant,
HARRY E. JONES, Appellee.

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By this appeal defendant, individually and as trustee under the last will and testament of Sarah E. Jones, deceased, seeks to recover a decree entered by the circuit court of Cook County whereby she was decreed to pay plaintiff, her brother,

\$2,418.04.

The record discloses that Sarah E. Jones, the grandmother of plaintiff and defendant, died testate in 1900 and her will was admitted to probate January 4, 1901 by the County Court of Cook County, where Mrs. Jones resided at the time of her death. At the time of the will certain property was devised to plaintiff and to defendant and it is the contention of plaintiff that she did not receive her last share from his sister and was the devise named in the will. The suit was brought for an accounting and that defendant be removed as trustee.

Defendant filed a counter claim seeking to recover from plaintiff one-half the amount she had expended for the support of their mother - \$2,320 and also \$240 for board and lodging furnished plaintiff. The cause was referred to a master in chancery who took the evidence and made up his report finding that plaintiff was entitled to \$2,418.04 from defendant but that defendant should not be removed as trustee and that defendant was not entitled to recover under her counterclaim. Objections were overruled to the

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report and afterward a decree was entered in accordance with the recommendations of the master.

One of the questions before us is the construction of the will and particularly the 5th and 7th paragraphs. Paragraph 5 is as follows: "I give and devise Lots One (1) two (2) Three (3) four (4), and five (5) in Block Sixteen (16) of the original Town, now City of Monticello in Platt County, Illinois, to my granddaughter, Nina A. Pool in fee simple. As I value the property at about Four Thousand Dollars (\$4000.) it is my will that the said Nina A. Pool shall pay to the said Harry K. Jones the sum of Two Thousand Dollars (\$2000) in eight (8) annual payments of Two Hundred Fifty Dollars (\$250) each, the first payment to become due and payable at the expiration of one year from the probate of this my last will and testament provided that the said Nina A. Pool shall have the privilege of paying all or any part of said sum before the same becomes due. The payment of the said sum is not made a lien on the premises in this clause described but is merely a personal obligation of the said Nina A. Pool as it is my will that she shall be able to dispose of said premises as she may see fit without being hampered by any lien or incumbrance against the same." By the 7th paragraph the testatrix devised 40 acres in Vermillion county to Nina A. Pool in fee simple in trust—that she, as trustee, should have full possession, management and control of the real estate for 25 years from the death of the testatrix, with power to rent, repair, pay taxes and execute the trust in accordance with Mrs. Pool's best judgment without compensation to her and without necessity of giving bond and after the payment of expenses, to pay the net income to plaintiff, the testatrix's grandson, during 25 years. At the expiration of that period the trustee should convey the real estate to plaintiff in fee simple;

report and returned a decree was entered in accordance with

the recommendations of the master.

One of the questions before us is the construction of the

will and particularly the 5th and 6th paragraphs. Paragraph 5

is as follows: "I give and devise unto (1) the (2) (3) (4)

four (4), and five (5) in Black fifteen (15) of the original town,

now City of Monticello in Platt County, Illinois, in my estate-

daughter, Miss A. Pool in fee simple. As I value the property at

about four thousand dollars (\$4000.) it is my will that the said

Miss A. Pool shall pay to the said Mary E. Pool the sum of two

thousand dollars (\$2000) in eight (8) annual payments of two

Hundred fifty dollars (\$500) each, the first payment to be made

one and payable at the expiration of one year from the date of

this my last will and testament provided that the said Miss A. Pool

shall have the privilege of paying all or any part of said sum

before the same become due. The payment of the said sum is not

made a lien on the premises in this clause described but is

merely a personal obligation of the said Miss A. Pool as it is

my will that she shall be able to dispose of said premises as she

may see fit without being harassed by any lien or incumbrance against

the same." By the 7th paragraph the testatrix devised as before

in Vermilion County to Miss A. Pool in fee simple in trust-that

she, as trustee, should have full possession, management and control

of the real estate for 25 years from the death of the testatrix,

with power to rent, repair, pay taxes and execute the trust in

accordance with Mrs. Pool's best judgment without consideration to

her and without necessity of giving bond and after the payment

of expenses, to pay the net income to plaintiff, the testatrix's

grandson, during 25 years. At the expiration of that period the

trustee should convey the real estate to plaintiff in fee simple.

3.

that if the trustee was of opinion that a greater income could be derived from selling the real estate and investing the proceeds, she had full power to do so. There was a further provision that if plaintiff died before the expiration of the 25 years, the property should be conveyed by the trustee to other designated parties.

The estate was closed by the County court of Piatt county and defendant, as trustee, proceeded to carry out the terms of the will. No part of the \$2,000 mentioned in paragraph 5 of the will was paid and nothing was said about this until shortly before a suit was brought in 1936, by plaintiff in the United States District court, when the controversy arose as to the correctness of defendant's accounting.

Defendant's contention as to this item is that ^{by} the 5th paragraph of the will the testatrix expressed a wish or hope that defendant would pay plaintiff the \$2,000; that it was not mandatory on defendant to pay the \$2,000 but that if there was such obligation 6 of the installments were barred by the 5 year Statute of Limitations. On the other side, plaintiff's position is that defendant was obligated to pay the \$2,000 either in installments or at one time and that the statute of Limitations began to run from the date provided for payment of the last installment. Plaintiff's contention was sustained by the master and chancellor. We are unable to agree with the construction contended for by either of the parties.

Obviously defendant would not be required to pay any part of the \$2,000 unless she accepted the 5 lots, but having done so, she was obligated to pay the \$2,000 to plaintiff in 8 annual installments. She could not wait until the 8th annual installment became due but plaintiff would have the right to demand at the end of each year \$250. We think the language is plain and unambiguous. It provides that Mrs. Pool "shall pay to" plaintiff Jones \$2,000 "in

that in the trustee was of opinion that a majority income would be derived from selling the real estate and investing the proceeds, and had full power to do so. There was a further provision that if plaintiff died before the expiration of the 25 years, the property should be conveyed by the trustee to other designated parties.

The estate was closed by the trustee, and of first course and defendant, as trustee, proceeded to carry out the terms of the will. As part of the \$2,000 mentioned in paragraph 3 of the will was paid and nothing was said about this matter being paid suit was brought in 1925, by plaintiff in the United States District Court, when the controversy arose as to the construction of defendant's accounting.

Defendant's contention as to this item is that the 25th paragraph of the will the testatrix expressed a wish on page four defendant would pay plaintiff the \$2,000; that is not ambiguous on defendant to pay the \$2,000 but that if there was such obligation of the installment was barred by the 7 year statute of limitation. On the other side, plaintiff's position is that defendant was obligated to pay the \$2,000 either in that lump sum or in one time and that the statute of limitation began to run from the date provided for payment of the last installment. Plaintiff's contention was sustained by the master and commissioner. He was unable to agree with the construction contended for by either of the parties.

Obviously defendant could not be required to pay any part of the \$2,000 unless she accepted the 7 date, but that does so, she was obligated to pay the \$2,000 to plaintiff in 2 annual installments. She could not withhold the 25th annual installment because she had plaintiff would have the right to demand it the end of each year 1925. We think the language at plain and unambiguous. It provides that Mrs. Cool "shall pay to" plaintiff Jones \$2,000 "in

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eight (8) annual payments of Two Hundred Fifty Dollars (\$250) each, the first payment to become due and payable at the expiration of one year from the probate" of the will. That the defendant, Mrs. Pool, "shall have the privilege of paying all or any part of said sum before the same becomes due." Defendant at her option might pay all of the installments at any time after the will was probated but she was obligated to pay \$250 at the end of each year. From this it follows that 6 installments of \$250 each are barred by the Statute of Limitations and that defendant must pay the 2 remaining installments aggregating \$500.

The master's report was dated October 10, 1940, and the objections to it were overruled November 13, 1940, in which the master states that the question of the allowance of attorneys' and trustee's fees was not passed upon because the primary purpose of the bill was not to remove the trustee but to secure an accounting.

September 30, 1942, the parties entered into a written stipulation which shows that there was an error of \$131.93 in the accounts made by defendant to plaintiff and that this item was due and owing to plaintiff. It follows that defendant owes plaintiff \$500 and \$131.93, making a total of \$631.93.

The record further discloses that Mrs. Pool rented the 40 acres devised to her in trust by paragraph 7 of the will and that she paid the net income annually to her brother, the plaintiff. That December 23, 1936, she sold the corn raised on the farm for \$600 for which she accounted to plaintiff. The sale was made to her husband at \$1 a bushel, which at the time was more than 12 cents above the market. April 1937, defendant's husband sold the corn for \$886.11 and the master and the decree found that defendant was liable to plaintiff for the \$286.11. The argument of counsel for plaintiff is that at least part of the \$600 was money belonging

right (3) annual payments of two hundred fifty dollars (\$250) each, the first payment to become due and payable at the expiration of one year from the probate of the will. That the defendant, Mrs. Paul, "shall have the privilege of paying all or any part of said sum before the same becomes due." Defendant at her option might pay all of the installments at any time after the will was probated but she was obligated to pay \$250 at the end of each year. From this it follows that a satisfaction of said sum was required by the statute of intestates and that defendant must pay the remaining installments aggregating \$500.

The master's report was filed October 10, 1920, and the objection to it was overruled November 12, 1920, in which case master stated that the question of the allowance of attorney's fees was not raised upon the record and that the bill was not to remove the trustee but to require an accounting.

September 20, 1922, the parties entered into a written stipulation which shows that there was an error of \$131.93 in the accounts made by defendant to plaintiff and that said error was due and owing to plaintiff. It follows that defendant owes plaintiff \$500 and \$131.93, making a total of \$631.93.

The record further discloses that Mrs. Paul raised the \$500 due to her in trust by her husband's will and that she paid the net income annually to her husband, the plaintiff. That October 20, 1920, she sold the corn raised on the farm for \$500 for which she accounted to plaintiff. The sale was made to her husband at 1 1/2 bushels, which at the time was worth 12 cents above the market. April 1921, defendant's husband sold the corn for \$506.11 and the master and the decree found that defendant was liable to plaintiff for the \$506.11. The statement of counsel for plaintiff is that at least part of the \$500 was money belonging

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to plaintiff and that since plaintiff did not know that the corn was sold to defendant's husband until long after the accounting, defendant was not entitled to make a profit on the corn. The difficulty with this is that the evidence shows that plaintiff was asking defendant for money; that defendant was unable to borrow from the bank on the corn and afterwards so as to raise money for plaintiff she sold the corn to her husband for 12 cents above the market. There is no contention that this is not the fact. In these circumstances we think it will be highly inequitable to allow plaintiff to recover the \$286.11 and the decree is erroneous as to this item.

About a month after defendant filed her answer, by leave of court, she filed her counterclaim whereby she sought to recover from plaintiff by virtue of §§1 and 2, ch. 107, Ill. Rev. Stat. 1943, one-half of the amount she had paid for the support of their mother.

The master in his report found "As to this item there is no dispute of the fact that the defendant did pay out for the benefit of Maye K. Jones, the mother of plaintiff, beginning with August 1927 down to and including February of 1937, the sum of \$2,487.76, said money being for rent for the premises occupied by the mother **** for milk bills, gas bills, electric light bills and some medicines;" that there was no evidence to indicate that she expected plaintiff, her brother, to repay her one-half of this sum until the controversy arose between them in January, 1937. That much testimony was introduced in reference to the mother's financial condition from the years 1927 to 1937, inclusive, "for the purpose of showing that the mother was not destitute, but on the contrary she had sufficient means and sufficient income to properly support herself until some time in the latter part of the year 1934." And continuing, the master

to plaintiff and that since plaintiff did not know that the corn was sold to defendant's husband until long after the association, defendant was not entitled to make a profit on the corn. The difficulty with this is that the evidence shows that plaintiff was selling defendant for money; that defendant was unable to borrow from the bank on the corn and afterwards to use it as collateral for plaintiff she sold the corn to her husband for 12 cents above the market. There is no contention that this is not the fact. In these circumstances we think it will be fairly reasonable to allow plaintiff to recover the \$200.00 and the interest thereon on to this item.

About a month after defendant filed her answer, on leave of court, she filed her counterclaim wherein she sought to recover from plaintiff by virtue of §§ 1 and 2, ch. 107, Ill. Rev. Stat. 1943, one-half of the amount and was paid for the purpose of this item.

The matter in this report found was to this effect: In no dispute of the fact that the defendant did pay out for the benefit of Mrs. K. Jones, the wife of plaintiff, beginning with August 1937 down to and including February of 1938, the sum of \$2,407.75, said money being for rent for the premises occupied by the mother for milk bills, gas bills, electric light bills and coal deliveries; that there was no evidence to indicate that she expected plaintiff, her brother, to repay her one-half of this sum until the controversy arose between them in January, 1937. That such testimony was introduced in reference to the mother's financial condition from the years 1937 to 1938, inclusive, "for the purpose of showing that the mother was not destitute, but on the contrary she had sufficient means and sufficient income to properly support herself until such time in the latter part of the year 1938." and continuing, the mother

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finds that the mother did have sufficient means to support herself properly from 1927 to the latter part of 1934 and that the money paid out by defendant was a voluntary contribution on her part and that she was not entitled to recover under her counterclaim.

Specific objection was made by defendant to the master's report that the master had made no finding that the mother needed support from the latter part of 1934 to March, 1937, but all objections were overruled. We think the evidence is clear that from the latter part of 1934 until March, 1937, the mother was unable to support herself and that the defendant, her daughter, necessarily expended for her support \$1,864.37, one-half of which is \$932.18, for which sum we think plaintiff was liable to defendant, Rogers v. Rogers, 51 Ill. App. 683, Longwith v. Riggs, 123 Ill. 258, and from this amount plaintiff is entitled to a credit of the \$631.93 above mentioned, leaving a net amount due from him to defendant and counterclaimant of \$300.25.

The amounts expended by defendant for the support of their mother are shown from the stipulation entered into by the parties and there is no substantial controversy that they are not correct. Nor is there any material conflict in the evidence that defendant was requesting plaintiff to contribute towards the support of the mother and that he was agreeable but did not have the money at the time. And the fact that defendant voluntarily expended the money for the support of her mother, as the master found, does not relieve plaintiff from his obligation to pay one-half of the amount expended by defendant for the support of their mother. In the Rogers case, (51 Ill. App. 683) suit was brought by the mother against the father for contribution towards the support of their crippled daughter, the father having theretofore secured a divorce. He had not contributed towards the support of the daughter for 5

finds that the father did have sufficient means to support her-
self properly from 1937 to the latter part of 1934 and that the
money paid out by defendant was a voluntary contribution on her
part and that she was not entitled to recover under her contract-
claim.

Specific objection was made by defendant to the master's
report that the master had made no finding that the father needed
support from the latter part of 1934 to 1937, and all ob-
jections were overruled. As to the evidence in this case from
the latter part of 1934 until March, 1937, the father was unable
to support himself and that the defendant, her daughter, necessarily
expended for her support \$1,224.37, one-half of which is \$612.18,
for which she is entitled to recover. See Wright v. Wright, 51 Ill. App. 603, 1934 Ill. App. 603, and
from this amount plaintiff is entitled to a credit of the \$612.18
above mentioned, leaving a net amount due from him to defendant
and reimbursement of \$612.18.

The amounts expended by defendant for the support of their
mother are shown from the allocation entered into by the parties
and there is no substantial controversy that they are not correct.
Nor is there any material conflict in the evidence that defendant
was requesting plaintiff to contribute towards the support of the
mother and that he was unable but did not have the money at
the time. And the fact that defendant voluntarily expended the
money for the support of her mother, as the master found, does
not relieve plaintiff from his obligation to pay one-half of the
amount expended by defendant for the support of their mother. In
the Wright case, (51 Ill. App. 603) it was brought by the mother
against the father for contribution towards the support of their
enjoyed daughter, the father having therefore secured a divorce.
He had not contributed towards the support of the daughter for 5

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years and it was decreed that he pay the mother \$650. The court there quoted §§1 and 2 chapter 107, Ill. Rev. Stat. 1943 and said: "So far as the decree enforces contribution for the five years preceding, we think there can be no complaint. The statute fixes the liability of the parents.***

"It is urged that the statute points out a mode of enforcement through the medium of the state's attorney and the overseer of the poor, by summary proceedings in the County court.

"This is the remedy where the pauper becomes a public charge through the failure of relatives to render the necessary support. When such support is rendered by one or two or more who are jointly bound therefor, a different remedy would be necessary, and we think it was properly sought in this case."

The Longwith case (123 Ill. 258) involved the construction of a testamentary trust. One of the beneficiaries was feeble-minded. The decree allowed one of the sisters a substantial amount out of the trust fund for board, care and nursing of the feeble-minded sister. The brother, who was a beneficiary of the trust, appealed to the Supreme court where the decree was affirmed. The court there said: "But if the law had been otherwise than as above announced, the plaintiff in error and his two sisters were, under the statute, (Starr & Curtis' Stat. 1732,) liable for the support of their sister Lavina, if she was a poor person, and unable to earn a livelihood in consequence of bodily or mental infirmity. If we accept the view of plaintiff in error in this case, his sister was such a poor person; and as the court had all the parties before it, and also control of the fund, we see no serious objection in the court acting upon the report of the trustee, to avoid a circuitry of action, and passing upon and allowing such claims as were for the necessary maintenance of Lavina, and of ordering them paid out of the fund under the control of the court."

years and it was decreed that he pay the costs \$800. The court there quoted §§1 and 2 chapter 107, Ill. Rev. Stat. 1943 and said: "So far as the decree enforces contribution for the five years preceding, we think there can be no complaint. The statute fixes the liability of the parents."

"It is urged that the statute points out a mode of enforcement through the medium of the estate attorney and the payment of the debt, by summary proceedings in the county court."

"This is the remedy where the parent receives a public notice through the failure of relatives to render the necessary support. When such support is rendered by one or two of the parents, the family bond thereon, a different remedy would be necessary, and we think it was properly sought in this case."

The Lanphier case (125 Ill. 428) involved the maintenance of a testamentary trust. One of the beneficiaries was Lanphier. The decree allowed one of the sisters a weekly allowance out of the trust fund for board, care and nursing of the beneficiaries. The brother, who was a beneficiary of the trust, brought to the Supreme Court where the decree was affirmed. The court there said: "But if the law had been otherwise than as above explained, the plaintiff in error and his two sisters were, under the statute, (Star & Justice, Stat. 1933,) liable for the amount of their sister's living, if she was a poor person, and unable to earn a livelihood in consequence of bodily or mental infirmity. It is except the view of plaintiff in error in this case, his sister was such a poor person; and as the court had all the parties before it, and also control of the fund, we see no serious objection in the court acting upon the report of the trustee, to avoid a circuity of action, and passing upon and allowing each claim as here for the necessary maintenance of Lavinia, and of ordering them paid out of the fund under the control of the court."

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The decree of the Circuit court of Cook county is reversed and the cause remanded with directions to enter a decree in accordance with what we have said.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

The decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a decree in accordance with what we have said.

REVEREND AND HONORABLE JUSTICE OF THE DISTRICT COURT.

Attorneys, J. J. and Ketchum, J. J., counsel.

DR. EARL L. RICHEY, Appellant,

v.

NORTHWESTERN UNIVERSITY, a corporation, Appellee.

323 I.A. 293

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Dr. Richey avering wrongful discharge sued January 14, 1943.

He filed a complaint of two counts, the first composed of 16, the second 15 verified paragraphs. A motion to dismiss was denied. Defendant then filed a verified answer to each paragraph of both counts. March 1, 1943, plaintiff filed an additional count of 18 paragraphs, verified. March 31, 1943, defendant made a motion to strike the entire complaint and each count of it to dismiss plaintiff's action, and asked for summary judgment in its favor against the plaintiff. This motion was made under sections 45, 48 and 57 of the Civil Practice Act. Under Rule II of the Supreme Court, the defendant incorporated as a part of its motion its answer formerly filed on February 15, 1943, to Counts 1 and 2. Suggestions for and against were filed. Among other things it was suggested the supposed causes of action alleged were inconsistent with and repugnant to each other and did not accrue within the time limited by law for the commencement thereof (Chap. 83 Ill. Rev. Stat. §15, par. 16, §16, par. 17). It was pointed out that if the cause of action accrued at all, it was either on April 13, 1934, or not later than September 1, 1934, which, in either case, would be more than five years before the filing of the suit. Defendant prayed the amended complaint be stricken, the action dismissed and final summary judgment for defendant entered. The motion was granted and judgment so entered July 2, 1943.

Afterwards, on July 9, 1943, plaintiff moved for an amended

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Dr. Henry's revised manuscript discusses and resolves 14, 1981.

On 11/10/1960, the following was received from the Bureau of the Federal Bureau of Investigation:

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and the other two are the same as in the first case.

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Elmer A. Hall, Secretary of the American Anti-Slavery Society, 1840

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2.

order to the effect that the final judgment of July 2, 1943, was in no way based on the statute of Limitations for the reason that this defense could not be validly and legally raised by motion but only by way of plea or answer. This motion was denied.

The appeal seems to turn on the question of whether the suit is barred by Section 16 of the Limitations Act. The material facts pleaded are, in brief, that in August, 1926, Dr. Richey was employed as an instructor in defendant's college of dentistry at a salary of \$3600 per year. The Dean of defendant's college sent two telegrams to him about the matter. These offered to employ him for full time for one year at a salary of \$3600 per year, with the expectation of an increase after the first year if all was satisfactory with defendant. Plaintiff accepted October 1, 1926, entered the service of defendant and served for a year. July 16, 1927, plaintiff was notified in writing he was to be promoted to the office of Assistant Professor of Prosthetic Dentistry on the faculty. Later, at a meeting of defendant's Board of Trustees, August 17, 1927, as appears from minutes made a part of the pleading, this promotion was approved. In August, 1928, plaintiff was again promoted to be an Associate Professor in the dental college of defendant by resolution, which is set out in the pleadings. Plaintiff again accepted and entered into the office or employment and continued to hold it for a period of about six years, when, it is alleged, he was wrongfully discharged. In the first part of the pleading the date of this wrongful discharge is alleged to have been April 13, 1934; in another part, as not later than September 1, 1934. The suit was begun January 14, 1943.

If Section 15 (the five-year section) of Chapter 83, Illinois Revised Statutes, is applicable, this cause of action was barred when it was begun, unless waived or extended for some reason. If Section 16, (the ten-year section) is applicable, then the suit is not barred.

Plaintiff first contends that the defense of the statute of

order to the effect that the trial judgment of July 1, 1904, was in no way based on the statute of April 1, 1904, but on the fact that the statute could not be validly and legally altered by action but only by way of amendment. This is the law.

The court I desire to turn on the question of whether the suit is barred by section 15 of the Illinois law. The statute facts stated are, in brief, that in January, 1904, the plaintiff employed as an investigator in defendant's office of investigation at a salary of \$2000 per year. The term of defendant's service with the defendant to him about the same time. Thereafter he was employed by the defendant for one year at a salary of \$2000 per year, after the expiration of an interval of one year. It is said that the plaintiff with defendant. Plaintiff's complaint is dated, however, the service of defendant was made for a year. This is, in fact, the first and notice in writing to be presented to the office of defendant of defendant's complaint on the plaintiff's suit, in meeting or defendant's suit of January, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543,

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Limitations cannot be raised on this record. He says it cannot be raised by motion but only by way of plea or answer. He says he had a legal right to make an affirmative reply to this defense and that this could not be done on a motion to dismiss. Plaintiff specifically raised this point in the trial court by motion made after the entry of judgment. The court denied the motion, we hold, rightly.

Section 48 (f), par. 172 of the Civil Practice Act, names as one of the causes for dismissal of an action that it "did not accrue within the time limited by law for the commencement of an action or suit thereon". Plaintiff says the court erred in not permitting a replication to this defense to be filed. We hold otherwise. Under paragraph 3 of the same section plaintiff had the right to show if he could that the suit was not barred. When leave was given to file the third count the order granted leave to defendant to answer the complaint, as amended, and plaintiff made no objection then or since. The effect of this was, we hold, under the sections of the Civil Practice Act above named, to open up the whole matter of pleading. The motion for leave related back to the entire complaint, including the first, second and third counts. The answers theretofore filed, therefore, did not waive the Statute of Limitations. The result is, if Section 15 is applicable to the facts as alleged (in other words, if the suit is on an unwritten contract) it is barred. If Section 16, as to written contract, is applicable, then the suit is not barred. We hold the contract sued on is unwritten, not written, within the meaning of the Statute of Limitations. The action is therefore barred. Knight v. Railway Co., 141 Ill. 110, 115; Conductors Benefit Ass'n v. Loomis, 142 Ill. 560, 571-2; Pond Creek Mill & Elevator Co. v. Clark, 270 Fed. 482, 485; Mowatt v. City of Chicago, 292 Ill. 578, 581-3; I. C. R. R. v. Miller, 32 Ill. App. 259, 267-8.

The leading cases in the classification of written as distinguished from unwritten contracts and from the standpoint of the statute of Limitations are cited in the briefs. Again, as often before, we have

The leading cause is the withdrawal of capital from the country, which has been the result of the economic crisis and the loss of confidence in the government. This has led to a sharp decline in investment and a consequent loss of jobs and income for the population. The government has been unable to implement effective policies to address these issues, and the situation has worsened over time.

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perused them. We doubt much whether anything we might write on this subject would add to the sum of legal knowledge. When it comes to classification the first rule of logic is necessary. A thing must either be or not be. A thing cannot be a "writing" and "not a writing" at the same time for classification purposes. This suit cannot be reasonably said to be based upon a written contract. We have not overlooked Williston on Contracts, Rev. Ed., Vol. 1, §568, nor the Restatement of the Law of Contracts, §§207, 208 and 209, cited by plaintiff. The motion made, as we understand the practice, searched the whole record and on that record plaintiff could not recover. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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... and ...

42911

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. MARJORIE WARFIELD,
Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body corporate and
politic, ANGELA M. CYLKOWSKI, a
Superintendent of School District
No. 7, STELLA M. JOHNSON, Principal
of Park Manor School of the City of
Chicago,

Appellees.

On Appeal of MARJORIE WARFIELD,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

323 I.A. 294

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

September 22, 1942, Mrs. Warfield brought suit in behalf of her three minor children, Thomas Smith, 12 years of age, Robert Smith, 9 years of age, and Evelyn Smith, 10 years of age, to recover judgment in mandamus to compel the admission of the children to the Park Manor School, located in Chicago at 7049 South Rhodes Avenue. Mrs. Warfield and the children live at No. 722 East 69th Place. They formerly resided at 4003 Calumet Avenue, and during their residence there Robert and Thomas attended the Phillips Public Achool while Evelyn attended St. Elizabeth Parochial schoool. When about to remove to their new residence the principals of their respective schools gave the children transfer cards to the Park Manor School. The cards were presented to the principal of Park Manor School, who refused to admit them, telling them they should attend the McCosh School, which is situated at 6543 Champlain Avenue. The McCosh School is not^{as} conveniently located so far as the children are concerned as the Park Manor

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STATE OF ILLINOIS
COUNTY OF COOK

v.

JOHN J. BROWN, JR.
CHIEF OF POLICE
CITY OF CHICAGO
vs.
JOHN J. BROWN, JR.
CHIEF OF POLICE
CITY OF CHICAGO

Defendant.

On behalf of Plaintiff,
[Signature]

88-11-11

1. That the Plaintiff is a resident of the City of Chicago.

2. That the Plaintiff is a resident of the City of Chicago.

3. That the Plaintiff is a resident of the City of Chicago.

4. That the Plaintiff is a resident of the City of Chicago.

5. That the Plaintiff is a resident of the City of Chicago.

6. That the Plaintiff is a resident of the City of Chicago.

7. That the Plaintiff is a resident of the City of Chicago.

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9. That the Plaintiff is a resident of the City of Chicago.

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13. That the Plaintiff is a resident of the City of Chicago.

14. That the Plaintiff is a resident of the City of Chicago.

15. That the Plaintiff is a resident of the City of Chicago.

16. That the Plaintiff is a resident of the City of Chicago.

17. That the Plaintiff is a resident of the City of Chicago.

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School, and there are other reasons why Park Manor is preferred. The McCosh School for part of the time has been crowded, and it has been found necessary to have the double shift system, as it is called, installed there. Where this system is used children are in attendance only one-half of the day, while otherwise they have a full day's session. The Park Manor School is situated about a quarter of a mile from the residence of relator, while the McCosh School is three-fourths of a mile away. There is inconvenience, too, in the fact that Marquette Boulevard, a much travelled street running east and west throughout this territory, must be crossed by children residing as relator's do when they attend the McCosh School.

Plaintiff charges in her petition that the district has been gerrymandered for racial reasons. Plaintiffs are Afro-Americans. They claim their rights under Article 8, Section 1 of the Constitution, which provides:

"The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of the state may receive a good common school education."

Also, under Section 159, Chapter 122, Smith-Hurd Illinois Annotated Statutes, which provides that the City of Chicago shall constitute one school district under the control of the Board of Education, with the power conferred upon the Board to divide the city into sub-districts and apportion the pupils to the several schools, provided, however, "that no pupil shall be excluded from or segregated in any such school on account of his or her color, race or nationality".

Plaintiff says her residence is in School District No. 7, within which are located the McCosh School at 6543 Champlain Avenue and the Park Manor School at 7049 South Rhodes Avenue; that the Board of Education of the City of Chicago has gerrymandered the area covered by the McCosh School so that it is comprised in the

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main of residents of the colored race; that where the lines of the area include white residents, the superintendent of District No. 7 (in which the McCosh School is located) has adopted the policy of granting permits to the children of these white residents for their attendance at the Park Manor School. She states such addresses to be Nos. 6725 Evans Avenue, 6723 Champlain Avenue, 6852 Cottage Grove Avenue, 722 East 69th Street, 6848 Evans Avenue, and 6646 Cottage Grove Avenue, all of which are farther from the Park Manor School than the address of petitioner. She says no permits have been granted to colored children living in the area covered by the McCosh School to attend the Park Manor School, and as a consequence there are no colored children in attendance at the Park Manor School. She further says that all of this is with the purpose of excluding colored children from the Park Manor School; that her children have not been admitted to the school and have been out of school entirely since the 3rd day of February, 1942, thereby depriving them of the common school education to which they are entitled.

October 14, 1942, the defendants made a motion to strike the petition and in support of their motion the Board points out that under the law of the City of Chicago has continuing power to divide the city into sub-districts and apportion the pupils to the several schools; that the petition shows that defendant Board did from time to time divide the City into such sub-districts and apportion the pupils in conformity with the statute; that it also appears that petitioner and her children reside at 722 East 69th Place, in one of these sub-districts known as the McCosh Elementary School District; that petitioner was directed to enroll the children in the school located in that district; that under the statute it is the duty of the petitioner to cause her children to attend school, but that she failed and refused to do so. Defendants also state that the relator does not show a clear and unequivocal

main of residents of the colored race; from whom the line of the area include white residents, the school district of No. 7 (in which the Negro school is located) has adopted the

policy of granting permits to the children of white residents for their attendance at the Negro school. The school has addressed to be No. 6725 Grand Avenue, 6725 Grand Avenue, 6725 Cottage Grove Avenue, 725 East 12th Street, 725 East 12th Street, 6848 Cottage Grove Avenue, all of which are farther from the Negro school than the address of petitioner. The school has also have been granted to colored children living in the area covered by the Negro school to attend the Negro school, and it is a

consequence there are no colored children in attendance at the Park Junior School. The further west one is on 12th Street the purpose of excluding colored children from the Park Junior School; that her children have not been admitted to the school and have been out of school entirely since the day it reopened, and thereby depriving them of the common school education to which they are entitled.

October 14, 1904, the following was a notice to parties

the petition and in support of their motion the Board of Education that under the law of the City of Chicago and continuing laws to divide the city into sub-districts and appoint the pupils to the several schools; that the petition shows that petitioner's

aid from time to time divide the city into sub-districts and appoint the pupils in conformity with the statute; that it appears that petitioner and her children reside in the West Side

place, in one of these sub-districts known as the North West Side School District; that petitioner was assigned to attend the

children in the school located in that district; that when the

statute it is the duty of the petitioners to cause her children

to attend school, but she failed and refused to do so, and

she also state that the school does not have a class and therefore

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vocal right to have the children placed or enrolled in the Park Manor School nor set forth facts showing any legal duty of defendants to enroll the children in this school; that the charges that the Board has discriminated against colored children are mere conclusions of the pleader and unsupported by any allegations of fact; that the allegations as to the children receiving transfer cards which entitled them to attend the Park Manor School and the charge that the defendant Board gerrymandered the McCosh School District are also mere conclusions of the pleader and untrue.

Affidavits were filed by the respective parties. The motion to strike the petition and dismiss the suit was heard on the petition, these affidavits and oral evidence. The motion was granted, the petition stricken, leave to amend denied and the suit dismissed. From that judgment we granted Mrs. Warfield leave to appeal to this court.

There is no question as to the law applicable in this case. Both Constitution and statute provide that children of citizens of any race shall not be discriminated against on that account in regard to their education. The statute gives to the Board of Education "continuing power to divide the city into sub-districts and apportion the pupils to the several schools", without discrimination on account of race and color.

The petition of Mrs. Warfield charges that the districts have been gerrymandered. No proof was produced on the hearing of anything of this kind, but on the contrary it was negatived by the evidence submitted, which shows the Board subdivided the whole city into sub-districts as directed by the statute. The bill alleges the gerrymandering only as a conclusion. It does not state any facts from which a gerrymander might be inferred. The court was justified in finding anything in the nature of a gerrymander was positively disproved.

Mr. Rogers, the district superintendent in charge of books and buildings survey since 1928, produced the records of the

vocal right to have the children placed or controlled in the school
 school board nor any other body having any legal right of
 interference to control the child in the school; that the board
 that the board has discriminated against colored children and
 mere conclusions of the board and not supported by any evidence
 tions of fact; that the allegations as to the child's condition
 transfer order which entitled him to attend the public school
 and the charge that the defendant board discriminated against
 school district and also the members of the board and members
 Alford was filed by the defendant board. The petition
 to strike the petition and district and also the members of the
 petition, these allegations and oral evidence. The petition was
 granted, the petition striking, leave to amend denied and the case
 dismissed. From that judgment we granted a writ of habeas corpus to
 appeal to this court.

There is no question as to the fact that the board is a body
 both Constitution and statute provide that children of different
 of any race shall not be discriminated against on that account
 in regard to their education. The statute gives to the board of
 Education "exclusive power to fix the rate of taxes and determine
 and location the pupils to the several schools, except the
 education on account of race and color.

The petition of Mrs. Alford against the board of education
 have been peremptorily denied. No proof was introduced on the hearing of
 another of this kind, but on the contrary it was negative by
 the evidence submitted, which shows the board excluded the child
 city into sub-districts as directed by the statute. The bill
 alleges the peremptory denial only as a conclusion. It does not state
 any facts from which a peremptory denial might be inferred. The court
 was justified in finding anything in the nature of a peremptory
 the positively disproved.

Mr. Justice, the district superintendent in charge of
 books and building survey since 1902, produced the records of the

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Board and his testimony in connection therewith showed positively that the McCosh Elementary School District was fixed by the vote of the Board of Education on February 23, 1921, when Edwin S. Davis was president of the Board; that the vote for the resolution fixing its boundaries was unanimous, and that these boundaries have remained unchanged since. The evidence further shows that at the time the boundaries of this school district were fixed, there were no citizens of Afro-American descent living in the district. It further appears from the records of the School Board that Section 2 of the Rules of the Board then and now provides:

"Pupils shall attend school in the district in which they reside except when given permits by the Superintendent of Schools to attend a school in another district."

The evidence of this witness also showed that No. 722 East 69th Place, where the relator resides, is within the boundaries of the McCosh School District and not within the Park Manor District. This being true, the relator cannot maintain this suit. Whether or not there may have been discrimination in the granting of permits is a question which is not before us. The power to give such permits is in the Superintendent of Schools. He is not a party. Neither are the persons to whom such permits have been granted. Discussion of that question would be unfair. If there are reasons why these children should be permitted to attend the Park Manor School, the matter should be presented to the Superintendent of Schools, and we assume that in such case he would make an investigation and give a fair decision.

The judgment of the trial court will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

Board and his testimony in connection therewith is not satisfactory
that the School Board District No. 1, which is the
of the Board of Education on February 22, 1911, was made
Davis was president of the Board; that the Board has been
fixing its boundaries and commission, and that Davis has been
have located another school. The evidence does not show that at
the time the boundaries of this school district were fixed, there
were no citizens of Afro-American descent living in the district.
It further appears from the records of the Board that Davis
2 of the Board of the Board then and now present;

which would show school in the district in
which they reside except when given
the superintendent of schools to remove a
school in another district.

The evidence of this witness also showed that no. 100 was
established, where the relation existed, in which the boundaries of
the School Board District No. 1, which is the Board of Education.
This being true, the relation cannot maintain this case, and it is
not shown that Davis has been located in the district as stated.
is a question which is not before us. The power to give such orders
in the superintendent of schools. He is not a party. He is not
the persons to whom such orders have been issued. The question of
that question could be raised. It there are persons who have been
then should be permitted to attend the same school, and
after should be permitted to attend the same school, and
we assume that in such case he would make an investigation and give
a fair decision.

The judgment of the trial court will be affirmed.

ATTEST:

42912

GENERAL AMERICAN STEEL AND TUBE COMPANY,
INCORPORATED, a corporation,

Appellant,

v.

AMERICAN ELECTRIC FUSION CORPORATION, a
corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

328 I.A. 294²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of defendant entered June 1, 1943, for costs and dismissing plaintiff's suit. On June 8 plaintiff moved to vacate the judgment and for leave to file an amended reply. The reply was submitted with the motion. The motion was denied. This appeal is from the judgment of June 1 and order of June 22, 1943.

Plaintiff's complaint was filed August 20, 1943, demanding damages of \$80,000. The complaint alleged in substance that the defendant agreed to make, sell and deliver to plaintiff certain machinery and equipment, which it failed to do as agreed. It also charged defendant made false representations as to the qualities of the machinery and equipment it would make. There was a motion to strike, which was denied. Defendant then filed an answer and afterwards an amended answer. The court ordered plaintiff to reply to new matter in the amended answer within ten days. Plaintiff moved to strike the amended answer. The motion was denied and plaintiff was again ordered to reply to the new matter averred in the amended answer. Plaintiff replied. Defendant then filed its motion in the alternative to strike plaintiff's reply to the amended answer and that plaintiff file a further reply to certain allegations of defendant's amended answer, or that in default thereof, judgment be entered against plaintiff and in favor of the defendant. The motion was allowed. Plaintiff did not make further reply as ordered, whereupon the judgment and

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order appealed from were entered.

It appears from the pleadings defendant is a manufacturer of steel products. One of these products is known as an "AEF Welder" or "Tube Mill", whose function is to weld electrically steel tubing and appurtenant equipment. The product is not sold ready-made but manufactured on orders, when given.

Samuel Bloomfield and John Landis caused the plaintiff corporation to be incorporated about February 25, 1940. The purpose of the corporation was to engage in the business of dealing in steel tubing for the purpose of making steel tubular furniture.

In January and February, 1940, Bloomfield and Landis, on behalf of the proposed corporation, opened negotiations with defendant to purchase from it the machinery supposed to be necessary in the business in which plaintiff was about to engage. The complaint says they informed defendant that plaintiff was in the business and would require machinery known as a tubing mill, "which would roll and weld a combination of mild steel tubing .040 inches thick and stainless steel .015 inches thick as one unit". The complaint also says defendant agreed to furnish a mill which would do the work, explaining how it would be done.

The fifth paragraph of the complaint says that Bloomfield and Landis, on the faith of these representations, purchased from the defendant the machinery and equipment as set forth in four written orders, copies of which are attached to and made a part of the complaint as Exhibits "A", "B", "C" and "D", for the sum of \$44,577.00, and that plaintiff ratified these purchases and deposited with defendant the sum of \$5,000.00; that plaintiff also leased a plant for the manufacture of tubular furniture at a cost of \$75,000.00.

The new matter in the amended answer, to which it seemed proper plaintiff should reply, was contained in the fifth and ninth paragraphs of that answer. The fifth paragraph alleged that on

order supplied from some source.

It appears from the preceding statement that a number of

of steel products, one of these products is known as the "steel
or "steel mill", whose function is to melt and cast steel
and subsequent treatment. The product is not a steel-mill but
manufactured on order, when given.

General description and some details of the steel-mill

function to be investigated about February 15, 1905. The purpose

of the corporation was to secure in the business of steel

steel tubing for the purpose of making steel structural members.

In January and February, 1905, the steel-mill and its

product of a product, structural members, steel tubing, etc.

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with steel tubing, and steel tubing, and steel tubing.

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with steel tubing, and steel tubing, and steel tubing.

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the steel-mill of the steel-mill, and the steel-mill

February 6, 1940, Bloomfield and Landis and defendant entered into, signed and delivered "a written agreement and contract consisting of the following writings: A letter dated February 6, 1940, from the defendant to Bloomfield and Landis, and accepted and signed 'O. K., John Landis, Samuel Bloomfield' by said Bloomfield and Landis, on February 6, 1940, a copy of which letter and of said acceptance and signatures is attached hereto, marked Exhibit A and made a part hereof. The four writings bearing the dates of February 5 and February 6, 1940, all of which were executed and delivered on February 6, 1940, simultaneous with the signing and delivery of Exhibit A above, and copies of which are attached to plaintiff's complaint as Exhibits A, B, C and D. thereof." The paragraph goes on to say that defendant attaches as its Exhibit "B", the letter dated January 23, 1940, from defendant to Bloomfield Manufacturing Company, to the attention of Samuel Bloomfield, which was referred to in the letter dated February 6, 1940. It further denies that defendant made any representations, agreements or undertakings with plaintiff through Bloomfield and Landis, expressly or by implication, relative to the manufacture and purchase of said machinery and equipment, except as set forth in the written contract. It also avers that at and prior to the time of this contract the machinery and equipment contracted for were known, definite and standard articles; that defendant was engaged in the business of the manufacture and sale thereof by trade names and descriptions stated in the contract. It admits Bloomfield and Landis paid the defendant \$5,000 at the time of the written contract, but denies that payment was made as a deposit or that it was made on behalf of the plaintiff, but on the contrary alleges this was the first payment on account of the contract.

By its letters of January 23 and February 6, attached to its amended answer, defendant plainly states that it considers that plaintiff was embarking upon an experimental work "which before you are through with it may require as much as two hundred thousand dollars of ready money," and that "we will not assume

[illegible]

4.

any kind of responsibility except that the machine as supplied by us will successfully weld tubing 1" O D by 16 or 18 gauge of either mild steel or stainless steel". By this limitation defendant expressly refused to undertake the building of a machine which would "roll and weld a combination of mild steel tubing * * * and stainless steel".

The other material new matter appears in paragraph 9 of the amended answer, where every allegation in paragraph 9 of the complaint is denied, and defendant further says it performed "all of the agreements and obligations of said contract on its part to be performed"; that the defendant manufactured and completed the machinery and equipment described in the contract on or before the date provided therein, repeatedly notified Bloomfield and Landis, tendered inspection and delivery, demanded they perform the obligations of the contract on their part; that they failed and refused to inspect the machinery and equipment; to supply to the defendant the final dimensions and information provided for in Exhibit "C", attached to the complaint; to notify the defendant where they desired the machinery and equipment shipped and delivered; to pay defendant the balance of the purchase price; or perform any of the agreements and obligations of the contract on their part to be performed. The answer concludes by averring defendant alleges it sustained damages in the sum of \$12,000 from plaintiff's failure to perform the contract.

The plaintiff urges the proposition that allegations of a complaint may amount to a denial of new matter contained in an answer so as to make unnecessary further denials by a reply. It is so held in City of Flora v. Bryden, 300 Ill. App. 1, 6-7-8, and Gliwa v. Washington Polish Loan & Bldg. Ass'n., 310 Ill. App. 465, 477-8. There are no allegations in this complaint, however, which make the rule applicable here. Neither is there any situation here as in Williamson v. American Ins. Union, 284 Ill. App. 150, where an answer, by specifically denying allegations of the complaint, raised an issue making further pleadings unnecessary.

[illegible]

5.

We have examined the proposed reply set up by plaintiff to this new matter in its pleadings submitted with its motion to set aside the judgment in connection with Section 40 of the Civil Practice Act, (1), (2), (3) and (4), and find that the pleading does not comply with the provisions of Section 40. It is quite apparent in our opinion that plaintiff could not recover under these pleadings even if the court had permitted the filing of this second amended reply. The pleadings show that the alleged representations upon which plaintiff relies are wholly inconsistent with the written contract; that the action is in substance one on the contract rather than on fraud or deceit; that the written contract was complete and unambiguous and expressly negatives the representations upon which plaintiff's suit is based, and finally, the plaintiff wrongfully refused to perform its contract. In the absence of a reply, as directed by the court, it was not error to enter judgment, and even if the amended reply had been filed in apt time, a motion to strike it and for judgment would have prevailed.

The judgment of the trial court will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur

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[illegible]

42984

GENERAL MOTORS CORPORATION (CADILLAC
MOTOR CAR DIVISION), a corporation,
Appelles,

v.

WILLIAM E. PHELAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO. 21

323 I.A. 295'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff was the lessee of an automobile garage at 2043 East 71st street in Chicago. It was subleased to Phelan, the defendant. By agreement attached to the sublease it was provided it might be terminated by either party giving 30 days' notice in manner provided. Plaintiff gave notice. Defendant remained in possession. Plaintiff sued in forcible entry and detainer October 1, 1943. There was trial by jury of six. At the close of the evidence plaintiff moved for an instruction in its favor. The motion was granted, verdict returned and judgment entered. Defendant appeals.

There is no conflict in the evidence. Defendant, however, contends it is insufficient. First, defendant says plaintiff did not affirmatively establish its right to possession. On this point he cites cases such as Szulerecki v. Openheimer, 283 Ill. 525; Connery v. VanThournout, 303 Ill. App. 406, and Lawyers' Reports Annotated, 1915C, p. 190. We hold the evidence sufficient. It disclosed without any conflict defendant had attorned to plaintiff. This was sufficient. Ill. Rev. Stat., 1943, Chap. 80, §14, p. 1971; Drew v. Mosbarger, 104 Ill. App. 635, 637; Goldblatt Brothers v. Hoefeld, 284 Ill. App. 31, 34. It also shows defendant made attornment by assignment. On well established principles defendant is therefore estopped to deny plaintiff's title as landlord or lessee of the premises. Rapalje and Lawrence Law Dictionary, Vol. 1, p. 96; Bouvier Law Dictionary, Vol. 1, p. 281.

GENERAL MOTOR CORPORATION (Plaintiff)
MOTOR CAR DIVISION, a corporation,
Appellee,

v.

WILLIAM E. MILLER,
Appellant.

881A.202

THE QUESTION PRESENTED BY THIS CASE

Plaintiff was the lessee of an automobile owned at 801 East First Street in Chicago. It was damaged by defendant. By agreement entered into between the parties it might be terminated by either party giving 30 days notice in writing provided. Plaintiff gave notice. Defendant remained in possession. Plaintiff sued in tortious injury and damages, 1, 1942. There was a trial of fact of law. At the close of the evidence Plaintiff moved for an instruction in the favor of the defendant. The court granted, verdict returned and judgment entered. Plaintiff appeals. There is no conflict in the evidence. Defendant, however, contends it is inadmissible. First, defendant says Plaintiff did not affirmatively establish the right to recovery. In this regard we cite cases such as Smith v. Smith, 253 Ill. 581; Connelly v. Hutchinson, 303 Ill. 400, and Hawley v. Hawley, 303 Ill. 400. We hold the evidence sufficient. It is noted without any conflict defendant had recourse to Plaintiff. It was sufficient. Ill. Rev. Stat., 1905, Chap. 90, § 101; Gray v. Gray, 304 Ill. 401, 402, 403; Pollock v. Pollock, 304 Ill. 401, 402, 403. It also shows defendant was informed by assignment. On well established principles defendant is estopped to deny Plaintiff's title as landlord or lessee of the premises. Pollock and Lawrence Law Dictionary, Vol. 1, p. 58; Rever Law Dictionary, Vol. 1, p. 211.

2.

The original lease, dated March 18, 1941, and amendment executed by the parties, dated May 28, 1943, were in evidence without objection. The signatures to these documents were admitted. Defendant testified he was the lessee of the premises; that he had been in continuous possession since renting and was in possession at the time of the trial. He further identified the amendment to the lease, dated May 28, 1943; testified the signatures were genuine; said he paid rent under the lease for June, July, August and September, and tried to pay rent September 24, 1943, for the month of October. He admitted that the interest of the original lessor, General Motors Sales Corporation, had become vested in the plaintiff by assignment. The proof that defendant attorned to plaintiff is uncontradicted and overwhelming. On well recognized principles (declared too often to require the citation of cases) defendant is estopped.

The second contention of defendant is that plaintiff did not prove proper and legal notice was given terminating defendant's rights under the sublease. As above stated, the sublease, as amended, provided plaintiff had the right to cancel it by giving 30 days' notice in writing of its intention to do so. Defendant received written notice of cancellation on September 1, 1943. The notice stated the rights of defendant would be terminated as of September 30 of that year. Defendant says the computation of time should be made by excluding the first day and excluding the last. This is the method of computation prescribed by the statute (Ill. Rev. Stat., Chap. 100, §6). Thus, it is pointed out, were the computations made in the cases of Dierssen v. Williamsburg City Fire Ins. Co., 204 Ill. App. 240, and O'Rourke v. Prudential Ins. Co., 294 Ill. App. 30.

The sublease provided that service of the notice might be made either personally or by registered mail at the option of the parties. Paragraph 18 of the original sublease is:

"That all notice to be given hereunder by either party shall be in writing and given by personal delivery to the lessee or to one of the executive officers of the Lessor or shall be sent by registered mail addressed to

[illegible][illegible]

the party intended to be notified at the post office address of such party last known to the party giving such notice and notice given as aforesaid shall be a sufficient service thereof."

As plaintiff points out, the provision is that the notice "shall be sent by registered mail", etc., and not for the delivery of it. The sending of the notice by mail is prescribed for in the same sentence which requires the delivery of personal notice, and the sending of the notice by registered mail is the alternative to the giving of personal notice. The paragraph concludes with the statement that the sending of notice by registered mail shall be a sufficient service thereof. There is no conflict in the evidence in regard to the sending of this notice. The stipulation shows that it was delivered in the mail, properly addressed and with the proper amount of postage thereon, on August 31, and that it was received by defendant through the mail on September 1, 1943.

The provision of the lease, as amended, was that defendant's tenancy might be terminated at any time after June 1, 1943, by giving defendant 30 days' written notice. The notice delivered told defendant that his lease was cancelled "in its entirety as of September 30, 1943". We hold that the time is to be computed from the date on which the notice was registered and mailed and that this constituted a due sending by registered mail to defendant. 46 Corpus Juris, §69, p. 559; Wolonter v. U. S. Casualty Co., 126 Va. 156; Geary v. Atlantic & Pacific Tea Co., 366 Ill. 625, 627; Wagner v. McClay, 306vIll. 560, 563; Gottingham v. National Mutual Church Insurance Co., 290 Ill. 26, 32; People v. Illinois Bankers Life Assurance Co., 283 Ill. App. 6, 10. This rule is, we hold, not inconsistent with Section 6, Chapter 100 of the Illinois Revised Statutes with reference to notice. A contrary rule, requiring the party giving the notice at his peril to mail it at such a time that its delivery would be made on or before the required date, would give to a contract of this kind perilous uncertainty, as a little reflection will show,

The first intended to be a collection of the best
 authors of each country, and to be published in
 such number and order as to be useful to the
 public.

As a matter of fact, the evidence is that the
"shall be sent by registered mail, and that the
of it. The sending of the notice by mail is
some evidence which requires the filing of a return
the sending of the notice by registered mail is
the filing of a return. The evidence is that the
that the sending of notice by registered mail is a
clearly shown. There is no evidence in the return
to the filing of the notice. The evidence is that
delivered in the mail, properly addressed and
of proper person, or agent of, and that it is
not through the mail or agent of, but

The provision of the law, as amended, was not applicable to the delivery of the notice to the defendant in the case of the People v. [redacted] 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616,

4.

Defendant also suggests the notice was insufficient because not signed by "any of the agents of General Motors Sales Corporation as provided for in said sub-lease". The lease, however, provided that its covenants and agreements were binding upon the parties and their respective successors, etc. Moreover, the amendment to the lease of May 28, 1943, recognized as a fact that the interest of the original lessor had become vested in the plaintiff by assignment. The point is not worthy of further comment.

Defendant contends in the third place there was an issue of fact as to whether (even conceding the sublease was properly cancelled) such cancellation was not waived by a later letter written by plaintiff to defendant on the same day. The defendant offered this later letter in evidence, but the court ruled it out. Defendant says this was error. The letter recites the service of notice by mail earlier in the day and adds that "more than a month ago, and in apt time", defendant was served with a notice terminating his sublease as of September 1, 1943; that in disregard of the notice, defendant sent a check for additional rent to the Detroit office of plaintiff, which was unintentionally cashed. The letter added:

"We hereby serve notice upon you that we regard your leasehold terminated as of that date and that our client will hold you liable for any refusal on your part to vacate the premises forthwith. The second notice to terminate as of October 1 was only sent as a precautionary measure. We do not waive our position that your lease is now cancelled and that if we sustain damage because of your failure to move we shall hold you liable.

"You may wish to give some consideration to the fact that we propose to use this space in immediate furtherance of the war effort."

The letter was signed by counsel for plaintiff, "By Preston Boyden".

This suit is based on the theory that the sublease was terminated by a later notice than the one referred to in the letter

Defendant also admitted that he was not a member of the Communist Party, but that he was a member of the National Student Reliance Fund, which is a non-profit organization. Defendant also admitted that he was a member of the National Student Reliance Fund, which is a non-profit organization. Defendant also admitted that he was a member of the National Student Reliance Fund, which is a non-profit organization.

1. The first of these is the fact that the defendant was not present at the trial. This is a serious matter, as it is a violation of the rules of the court. The defendant was not present at the trial, and this is a serious matter, as it is a violation of the rules of the court.

100-443888-100

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the

The first of the three papers by H. J. ...

"DOLBY" LOGO

This will be based on the theory that the following was

5.

The letter was wholly immaterial and would have only tended to confuse the jury. It was, we hold, properly excluded. After the receipt of the last notice, defendant attempted to remain in possession by a like maneuver. On the second time it failed to work.

The judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

2.

The letter was duly answered and will now only remain to
confirm the fact. It was, in fact, a perfectly correct
receipt of the fact stated, and was received in time to be
by a fine remedy. On the whole, it is a fine remedy.
The subject will be written.

WATSON.

WATSON, L. S., and others, L. S., and others.

42457

PEOPLE OF THE STATE OF ILLINOIS,
on relation of CALUMET FEDERAL
SAVINGS & LOAN ASSOCIATION OF
CHICAGO, a corporation; FRED E.
HUMMEL, Successor Trustee;
ADELAIDE NEU, ANTON LORENZEN
and TILLIE LORENZEN, his wife,
Appellees,

v.

CITY OF CHICAGO, a Municipal
Corporation; COUNTY OF COOK,
STATE OF ILLINOIS, a Municipal
Corporation,
Defendants.

On The Appeal of the COUNTY OF
COOK, a body politic and
corporate,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

323 I.A. 295²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The City of Chicago having been dismissed from the proceeding, judgments were entered against the defendant County of Cook on a trial before the court without a jury in the sums of \$7,500, \$2,500, \$3,000 and \$1,500, in favor of the respective owners of certain real estate (hereafter called the Calumet, Hummel, Neu and Lorenzen properties) for damages to the respective parcels caused by closing Torrence avenue at 95th street and 97th street in Chicago. Defendant appeals.

Before the action of defendant complained of, Torrence avenue was a north and south through street, extending from Lincoln Highway on the south to its northern terminal at 95th - an east and west street, where north bound traffic, making a left turn, proceeded westerly about 200 feet to Colfax - a north and south street ending on the south at 95th street. South bound traffic on Colfax avenue turned east on 95th street to Torrence avenue and thence south. The Calumet property, on the southwest corner of 95th street and Torrence

PEOPLE OF THE STATE OF ILLINOIS,
ON Petition of J. L. ...
SAVINGS & LOAN ASSOCIATION OF
CHICAGO, a corporation; and
HUNTER, Successor Trustee;
ADELAIDE THU, and her husband,
and TILLIE JOHNSON, his wife,
Appellees,

v.

CITY OF CHICAGO, a Municipal
Corporation; COUNTY OF COOK,
STATE OF ILLINOIS, a Municipal
Corporation,

Defendants.

On The Appeal of the County of
Cook, a body politic and
corporate,

Appellant.

IN JUSTICE WHEREIN WILLIAM ...

The City of Chicago having been dissolved from the ...
two cents were entered against the defendant ...
trial before the court about a year in the sum of \$7,500, ...
\$3,000 and \$1,500, in favor of the respective ...
real estate (hereafter called the Calumet, ...
properties) for damages to the respective ...
Torchance Avenue at 35th Street and 37th Street in Chicago. ...
grant appellee.

Before the action of defendant ...
was a north and south through street, extending from ...
on the south to its northern terminal at 35th - an east and west
street, where north bound traffic, making a left turn, proceeded
westerly about 200 feet to Calumet - a north and south street ending
on the south at 35th Street. South bound traffic on Calumet Avenue
turned east on 35th Street to Torchance Avenue and thence south. The
Calumet property, on the southwest corner of 35th Street and Torchance

2.

avenue, abutted 75 feet on 95th street and 125 feet on Torrence avenue; it was improved by an automobile service and filling station- having two drives into each of the abutting streets, a dance hall and a two-story frame building fronting on Torrence avenue, used for a tavern and living quarters. The Hummel property, on the southeast corner, abutted 37 feet on 95th street and 600 feet on Torrence avenue; the south line extended easterly 193 feet to the right-of-way of the C. R. I. & P. Ry. Co., which formed the east boundary of the lot; there were two small truck garage buildings on it. The Neu property, on the northeast corner of Torrence and 97th street, abutted 193 feet on 97th street and 325 feet on Torrence avenue; it was improved by a one-story manufacturing building which was vacant from February, 1937 until September, 1940. The Lorenzen property, 50 x 125 feet on the west side of Torrence avenue, about 191 feet south of 95th street, was improved by a two-family frame residence building, occupied by the owners and a tenant.

In May and June, 1939, defendant extended Colfax avenue directly south to 96th street and then, by a broad curve to the southeast, into Torrence avenue about 200 feet north of 97th street; at the same time defendant closed Torrence avenue between 95th and 97th streets by building a 6 inch concrete curb across it on the south line of 95th street and a similar curb along the north line of the newly constructed pavement in Colfax avenue; extended across Torrence avenue in a southeasterly direction from the point where the north line of the Colfax pavement intersected the west line of Torrence avenue, to the east side of Torrence at 97th street; circular concrete curbs of the same height and with a diameter a few feet greater than the width of the pavement in the street-affording facility for the turning of vehicles-were placed in Torrence avenue about 40 feet south of 95th street and opposite the intersection of the north line of the Colfax pavement with the west line of Torrence avenue, and the north half of the west frontage of the Neu property;

avenue, abutting 75 feet on 55th street and 125 feet on Torrence
avenue; it was improved by an automobile service and filling
station-having two drives into each of the abutting streets, a
dance hall and a two-story frame building fronting on Torrence
avenue, used for a tavern and living quarters. The lot of property
on the southeast corner, abutting 37 feet on 55th street and 600
feet on Torrence avenue; the south line extended easterly 125 feet
to the right-of-way of the C. R. I. & N. Y. Co., which formed the
east boundary of the lot; there were two small brick frame buildings
on it. The new property, on the northeast corner of Torrence and
57th street, abutting 125 feet on 57th street and 125 feet on Torrence
avenue; it was improved by a one-story manufacturing building which
was vacant from February, 1927 until September, 1928. The lot of
property, 50 x 125 feet on the east side of Torrence avenue, about
151 feet south of 55th street, was improved by a two-story frame
residence building, occupied by the owner and a tenant.
In May and June, 1929, defendant extended Colfax avenue
directly south to 55th street and then, by a broad curve to the south-
east, into Torrence avenue about 500 feet north of 57th street; at
the same time defendant closed Torrence avenue between 55th and
57th streets by building a 6 inch concrete curb across it on the
south line of 55th street and a similar curb along the north line of
the newly constructed pavement in Colfax avenue, extending across
Torrence avenue in a southeasterly direction from the point where
the north line of the Colfax pavement intersected the west line of
Torrence avenue, to the east side of Torrence at 57th street; concrete
curbs of the same height and with a diameter of 12 feet
greater than the width of the pavement in the street-allowing
freely for the turning of vehicle-were placed in Torrence avenue
about 40 feet south of 55th street and opposite the intersection of
the north line of the Colfax pavement with the west line of Torrence
avenue, and the north half of the west frontage of the new property;

3.

to afford access to and egress from that part of Torrence avenue between the two circular curbs 96th street was opened between Torrence avenue and Colfax avenue; east of Torrence avenue it is closed. A private driveway from the south half of the Neu property gave access to Colfax avenue, extended into Torrence.

shortly after these changes the owner of the Calumet property filed a complaint seeking a mandatory injunction to compel removal of the curbs and assessment of damages; the owner of the Hummel property joined in the suit; the trial court granted an injunction and retained jurisdiction for the ascertainment of damages to plaintiffs' properties; on appeal the decree was reversed. Calumet Fed. Sav. & Loan Ass'n v. Chicago, 306 Ill. App. 524. This action followed, plaintiffs charging that the erection of the curbs has seriously impaired, if not wholly destroyed, the vehicular accessibility to the several properties, as a result of which their value has declined by a substantial amount. Although evidence on the subject was excluded by the court, it is obvious that the purpose of extending Colfax avenue to join with Torrence avenue was to eliminate the left turns and consequent crossing of traffic on 95th street, and that the closing of Torrence avenue was to force the traffic into the new channel. Plaintiffs do not question defendant's right to do this, or the advisability of doing it. The effect of placing the curbs in Torrence avenue was to make it a blind court at 95th street and 97th street,

Owners of property abutting on a public street or alley have the right of free and unobstructed use of the public way, at least as far as the nearest cross-streets. Their right to recover damages to their property caused by making the public way a blind court adjacent to the property has been long established. In the much cited case of Rigney v. City of Chicago, 102 Ill. 64, decided in 1881, plaintiff owned a lot fronting on Kinzie street, about 220 feet east of Halsted street; the city constructed a viaduct in Halsted street across Kinzie, cutting off

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10-10-1964

... and retained jurisdiction for the purpose of ...
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...the several properties, as well as the

...is paired, it not really because, the various

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cluded by the court, it is not a part of the record.

[illegible]

...do not

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

... of property belonging to a public institution or to a public official ...

the most important of these is the fact that the

... of

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...constructed a viaduct in 1862, which was destroyed by fire in 1864.

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access to Halsted street, except by a stairway, at the intersection.

In upholding plaintiff's right to damages the court said (80-81):

"In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law." To the same effect is City of Chicago v. Burcky, 158 Ill. 103, 110; Village of Winnetka v. Clifford, 201 Ill. 475, 479.

Defendant relies on the case of Hacker Co. v. City of Joliet, 196 Ill. App. 415. We do not find any case in which that decision has been followed, and we cannot agree with the conclusion of the court. There plaintiff's property, used for manufacturing purposes, fronted on Collins street, immediately north of the right-of-way of the Michigan Central railroad; under an ordinance of the city the right-of-way was elevated, closing Collins street to the south, except for a passageway left for pedestrians. In holding that no legal action accrued therefrom, the court said (425): "Collins street is not turned into a blind court. Appellant still has free access not only to and from the street abutting its property and to the north, but also from that street directly south for foot passengers and directly south for vehicles excepting they must travel about two blocks further than heretofore. The inconvenience suffered by appellant in being compelled to travel this additional distance to reach that part of the city lying south of the improvement is of the same kind and character that is suffered by all people who desire to travel with vehicles in

access to related street, except by a detour, at the intersection.
In applying plaintiff's right to passage and egress (10-21):
"In all cases, to prevent a necessary it must be shown that there are some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with the property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to the property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision and in the absence of the common law, the law is that in all such cases, and no subject, the common law is the law of the land and the plaintiff has no doubt it is the intention of the law to give the plaintiff compensation to make good in all cases, but for some legislative enactment, an action could be brought for the same law." To the same effect is Illinois v. Board of Trustees of the City of Chicago, 100 Ill. 100, 101; Illinois v. Board of Trustees of the City of Chicago, 100 Ill. 100, 101; Illinois v. Board of Trustees of the City of Chicago, 100 Ill. 100, 101.
Defendant relies on the case of Illinois v. Board of Trustees of the City of Chicago, 100 Ill. 100, 101. It is not true that in that case it was held that there followed, and we cannot agree with the majority of the court. There plaintiff's property, used for manufacturing purposes, located on Collins street, immediately north of the intersection of the Michigan Central railroad; when an ordinance of the city the right-of-way was elevated, closing Collins street to the north, except for a passageway left for pedestrians. In doing so the city had no legal authority as such therefore, the court said (100): "The ordinance is void and the plaintiff is entitled to recover damages for the loss of access to and from the street during the period of the closure, but also from that street directly south for loss of access to the street for vehicles excepting they must travel about two blocks to reach them hereafter. The inconvenience suffered by plaintiff is more compelled to travel this additional distance to reach that part of the city lying south of the intersection is of the same kind and amount that is suffered by all people who desire to travel with vehicles in

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that direction, differing only in degree. The injury falls within the rule announced in the Union Building Ass'n case, supra (102 Ill. 379), and not within the rule announced in the Rigney case, supra (102 Ill. 64), *." In the Union Building Ass'n, case, plaintiff's property was located at Washington and La Salle streets, Chicago, several blocks north of Jackson street, at which point the City of Chicago vacated La Salle street, and it was held that plaintiff had suffered no special or peculiar damage to its property. In the Rigney case, Kinzie street on which plaintiff's property abutted was closed at the next cross-street, and it seems to us the rule of that case, rather than the Union Building Ass'n. case, should have controlled.

Plaintiffs called two witnesses to testify as experts as to the value of the several properties before and after the closing of Torrence avenue. Defendant contends that the testimony of these witnesses as to values after the street was closed was based upon improper factors, which destroyed the probative value of their testimony. The Calumet and Lorenzen properties were on the west side of Torrence avenue, in the block between 95th and 96th streets; the Hummel property, on the east side of Torrence, extended to 96th street, which had been vacated east of Torrence; access to and egress from each of these properties, to the north and south, was given by 96th street to Colfax avenue, a short block to the west; the north line of the Neu property, on the east side of Torrence, was several hundred feet south of 96th street, which afforded the same facilities of access to and egress from this property as were afforded to the other properties. Each of plaintiffs' witnesses based his values of the respective properties after the changes made by defendant upon the closing of Torrence avenue beyond 96th street - that is, as to the Calumet, Hummel and Lorenzen properties, the closing of Torrence at 97th street, and as to the Neu property, its closing at 95th street. Defendant contends that damages to the several properties caused by the closing of Torrence avenue beyond 96th street, the nearest cross street,

[illegible]

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was of the same kind, although it might have been in a greater degree, as that sustained by the general public, and therefore damages not recoverable at law. In Hill v. Kimball, 269 Ill. 398, where relief by injunction was denied plaintiffs to prevent the closing of streets and alleys in the block adjacent to plaintiffs' property, the court, after discussing a number of cases, including Illinois Malleable Iron Co. v. Park Comrs., 263 Ill. 446, said (410): "It seems quite clear, also, that under the authorities in this State appellants cannot recover damages for the vacation of any of the streets or alleys in any part of said Hitch's Fairview subdivision unless as to the vacated alleys in the block in which appellants' property is located." In the Malleable Iron Co. case, plaintiff, as the owner of property fronting on Diversey parkway, sought to restrain the enforcement of an ordinance of Lincoln Park prohibiting the use of Diversey parkway, a boulevard, by any vehicle for carrying goods, merchandise or wares or other articles. The court construed the ordinance as not prohibiting the use of the parkway by such vehicles to and from plaintiff's property from and to the nearest cross streets, and in denying plaintiff's contention that "its right as an abutting owner is to use the street upon which its property abuts as far as such street constitutes the most direct route to the destination, and that the requirement of taking a circuitous route constitutes an impairment of that right," discussed with approval the cases of City of East St. Louis v. Flynn, 119 Ill. 200, and Guttery v. Glenn, 201 Ill. 275, and said (452): "So in the present case, the inconvenience caused the appellant by the exclusion of traffic teams from the boulevard, though greater in degree, is precisely the same in kind as that to all other persons having occasion to do heavy hauling from places in the neighborhood of the appellant's premises to places east, north-east or southeast of the intersection of the next street east of them. If the boulevard might be entirely closed to all passage by its vacation or complete obstruction, without any liability for damages, certainly its partial closure by the exclusion of traffic teams could not be the basis of

... of the same kind, although it might have been in a ...
degree, as that sustained by the ...
... not recoverable at law. In Smith v. ...
... relief by injunction and ...
of streets and alleys in the block adjacent to ...
the court, after discussing a number of cases, including ...
W. H. H. Co. v. ..., 123 Ill. 442, said (111): "It
seems quite clear, also, that where the ...
appellate cannot recover damages for the violation of any of the ...
or alleys in any part of said ...
to the vacated alleys in the block in which ...
located." In the W. H. H. Co. v. ..., 123 Ill. 442, the court ...
property fronting on a highway, ...
ment of an ordinance of Lincoln ...
highway, a boulevard, by any vehicle for ...
or were on other vehicles. The court ...
prohibiting the use of the highway by ...
plaintiff's property from ...
denying plaintiff's contention that ...
to use the street upon which the ...
constitutes the most direct route to ...
requisite of taking a circuitous route ...
that right," discussed with ...
... 112 Ill. 200, and Quincy v. ..., 101 Ill. 270, ...
422): "In the present case, the ...
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the appellee's premises to ...
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action, without any liability for ...
... by the exclusion of traffic ...

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a claim for damages or an injunction."

In determining the value of the Calumet property in respect to the rental value of that part used for the filling station and for a tavern, plaintiffs' witnesses took into consideration the loss of patronage of the filling station and the tavern after the closing of Torrence avenue. This was particularly true as to the filling station, the rental value being determined by the gallons of gasoline sold per year. Diversion of customers of a business carried on in plaintiff's property is not an element of damage. Hohmann v. City of Chicago, 140 Ill. 226; City of Chicago v. Spoor, 190 Ill. 340. In Cuneo v. City of Chicago, 292 Ill. App. 235, the court had under consideration plaintiff's claim for damages to its building, at the southwest corner of Clark and Wacker Drive in Chicago, due to the removal of the South Water street market and the change in grade of old South Water street, renamed Wacker drive; evidence was introduced showing that to a large extent the decline in rentals received by plaintiff was due to the removal of the market business from South Water street. After discussing the Hohmann and Spoor cases, cited by us, the court said (241): "The removal of the market from South Water street had the effect of diminishing the rental receipts of plaintiff's building, and we hold that defendant is not liable in damages for this."

One of plaintiffs' witnesses testified that the value of the Hummel property had depreciated through the loss of advertising due to the closing of Torrence avenue as a main thoroughfare abutting this property. This advertising could only arise from the number of people passing the property, and in principle must rest upon the same basis and be controlled by the same rules of law as affect the diversion of customers from a place of business. It was not a proper element of damage.

These factors of value, in so far as they were considered by the witnesses in fixing the value of the properties after the closing of Torrence avenue, were improper. There is nothing in the record

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to indicate the extent to which the opinions of the witnesses were affected by these improper factors. For this reason the judgments appealed from must be reversed and the cause remanded for a new trial in accordance with the views expressed herein.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

to indicate the extent to which the evidence is affected by these factors. The fact that the evidence is affected from must be revealed and the cause explained for a trial in accordance with the rules of evidence.

O'Connor, P. J., and Lachar, J. J., editors.

42507

ROY PARTHIE, as Administrator of
the Estate of Anna Parthie, also
known as Anna Shipila, Deceased,
Appellee,

v.

WALTER J. CUMMINGS and DANIEL C.
GREEN, as Receivers, etc., et al.,
doing business as Chicago Surface
Lines,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 296

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment of \$4,000 entered in an action for the wrongful death of the mother of the plaintiff administrator.

Decedent was 58 years of age; she was living in the home of plaintiff and supporting herself by working in an embroidery factory at average weekly wages of \$18, and in addition doing house work and caring for children, for which she received \$5 per week. On the night of the accident resulting in her death she had been working at the home of Charles Mack at 4920 south Kildare avenue, Chicago - about two blocks north of the place of her injury; she left the Mack home about midnight, walking south on the west sidewalk toward the intersection of Kildare avenue, Archer avenue - extending northeast and southwest, and 51st street - an east and west street; there are two street car tracks on Archer avenue; there was a safety island for street car passengers on each side of Kildare; the one for northeast bound passengers, located just south of the south rail, extended about 70 feet from the west line of Kildare. It had been raining - the sidewalks, pavement and rails were wet. There was some evidence that it was misting or drizzling at the time of the accident. Mr. Mack accompanied decedent to 50th street and Kildare. she was

6232

WYATT, a resident of
the State of Illinois,
known as Wyatt,
Admission

7.

WYATT, a resident of
the State of Illinois,
known as Wyatt,
Admission

Admission

331.1.33

MR. JAMES H. HARRIS, JR.,

Deputy Sheriff from a precinct of 12,000 people in the

action for the removal of the body of the deceased

deceased.

Deputy Sheriff from a precinct of 12,000 people in the

of plaintiff and defendant, the body of the deceased

factory at Chicago, Illinois, and in the State of Illinois

work and caring for the body of the deceased

On the night of the accident, the body of the deceased

lying at the base of the bridge, at the corner of the bridge

Chicago - about two blocks north of the corner of the bridge

the black home about midnight, which was on the west side of

toward the intersection of Illinois Avenue, which was on the

northwest and southwest, and that street - an east and west street

there are two streets on each side of the street, there was a

island for street car passengers on each side of the street

for northeast bound passengers, located just south of the street

extended about 75 feet from the west line of Illinois. It had been

raising - the sidewalk, pavement and walls were wet. There was

evidence that it was raining or drizzling at the time of the accident.

Mr. Earl accompanied the body of the deceased to the street and

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next seen by the motorman of the southwest bound street car which struck her. He testified that he did not see her leave the curb; that the southwest bound traffic of cattle trucks was heavy; that he was looking to the right and left and straight ahead and happened to see her as she came out from these trucks; that she was about 20 feet in front of him and about five feet north of the tracks; that she was looking southwest and sort of trotting or running; he rang the gong, put on the brakes and pulled into reverse; she did not change her course of direction but kept right on going ahead; the left hand corner of the car came in contact with her; he testified first that the front end of his car was about 25 feet west of the west cross-walk of Kildare, but on cross-examination said that decedent was about five feet west of the west cross-walk and the front end of ~~the~~ car about that cross-walk when he first saw her.

Raymond Boehm, a witness for plaintiff, was driving his automobile northwest on Archer; he testified that the traffic was not heavy; that when about a half block from the intersection with Kildare his attention was attracted by the grinding of the street car brakes and he saw decedent flying through the air just after she was hit, approximately at the west cross-walk of Kildare.

The street car had stopped at Karlov avenue, about two stops to the east; the headlights and the lights inside the car were lighted and the car was making the usual noises; without changing its speed it crossed Kildare at about 15 or 20 miles an hour and, according to the motorman, with the rails such as they were that night an emergency stop could be made in 60 or 70 feet; the reverse would not make much difference. The car crew and Boehm testified that after being struck by the car the body of decedent was lying about the center of the safety island. Melco, a witness for plaintiff who lived near by, testified that the body was about four feet from the east end of the safety island. The motorman and conductor say that the car stopped with ~~the~~ car end even with decedent's body. Plaintiff's

3.

witnesses say that the rear end of the car was stopped at the west end of the safety island, or in front of a barber shop about 100 feet west of Kildare.

Plaintiff does not claim that the motorman acted negligently after he saw decedent in front of the car. The negligence relied upon is covered by the charge that defendants failed to operate the car so as to have it under proper control, having regard to the traffic and to the use of the way. Defendants contend that as a matter of law plaintiff failed to establish negligence by the defendants or due care by decedent, or in the alternative, that the finding of the jury for plaintiff as to these matters is against the manifest weight of the evidence.

Kildare avenue was a stopping place for receiving and discharging street car passengers. There were no stop lights or signs and the cattle truck traffic at the time was heavy. Pedestrians wishing to cross the street, and particularly those desiring to board a northeast bound street car, might reasonably be expected in the exercise of due care to work their way between these trucks to a place on or near the street car tracks. Without slowing in any degree the motorman approached and crossed this intersection at a speed which, under the condition of the rails, precluded stopping the car under 60 or 70 feet. He did not see decedent leave the curb or make her way through the trucks on Archer avenue. Except for the statement that the traffic was heavy, there is no testimony showing the actual conditions at the time decedent moved from the curb to her position near the track where the motorman saw her. There is testimony that she was a person of careful and prudent habits. Under the circumstances the questions of due care by decedent and negligence of defendants were matters for the jury. Its verdict has been approved by the trial court and is not against the manifest weight of the evidence.

4.

Defendants objected when the testimony as to decedent's habits of care and prudence was offered, and tendered the motorman as an eye witness of plaintiff's actual contact with the street car, and after the motorman had testified on behalf of defendants a motion was made to strike the testimony relating to decedent's habits, thereby preserving for review the question of the admissibility of this testimony. Petro v. Hines, 299 Ill. 236. In that case the general rule is stated to be that where no one saw the accident resulting in the death, habits of care may be introduced, but "where there is an eye-witness who saw the infliction of the injury, the jury must then determine from the testimony of this witness and from the facts and circumstances surrounding the injury whether deceased was careful or negligent, and in such case evidence of the habits of deceased as to care and prudence is not admissible." In the present case the motorman saw the decedent for only the briefest instant before the street car struck her. At that time she had emerged from the traffic and was trotting or running, and the question of due care for her safety necessarily covered her conduct from the time she left the curb until she came within the view of the motorman. With this defendants agree. In their reply brief they say, "If she was habitually careful and was exercising such habitual care at that time (when she left the curb), she would have made some reasonable effort to look or listen for a street car before undertaking to cross through the vehicular traffic." And again, when speaking of decedent's position after emerging from the traffic and being confronted with the approaching street car, defendants say, "Where one fails to use due care to avoid getting into a position of danger, recovery cannot be had even though such person may have used all due care in attempting to escape from such danger." (citing cases.) The question of due care of decedent at a time when there were no eye witnesses, being material, the court did not err in receiving testimony as to habits or in refusing to strike it on motion.

Defendants contend that the damages awarded are excessive.

Defendants contend that the evidence is insufficient to establish the guilt of the accused. They argue that the evidence is circumstantial and that the accused has a right to be presumed innocent until proven guilty beyond a reasonable doubt. They further contend that the evidence is inconsistent and that the accused has a right to a fair trial. The court, in its opinion, found the evidence to be sufficient to establish the guilt of the accused. It held that the evidence was consistent and that the accused had been proven guilty beyond a reasonable doubt. The court also found that the accused had waived his right to a fair trial. The court's decision was based on the evidence presented at the trial and the court's own findings of fact. The court's decision was affirmed by the appellate court. The court's decision was based on the evidence presented at the trial and the court's own findings of fact. The court's decision was affirmed by the appellate court.

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The evidence shows that decedent's life expectancy was 10.81 years; that she did work in the family of her son, and on several occasions during the illness of her daughter-in-law assumed full charge of the household, and that she contributed various sums, approximating \$5 per week, to her son. The damages to be awarded in a case of this kind cannot be reduced to a mathematical certainty. They are based upon a reasonable expectancy of benefits to be received. We do not consider the instant verdict so excessive as to require reversal or a remittitur. Lauer v. Elgin, J. & E. Ry. Co., 305 Ill. App. 200.

Twenty-six instructions were given to the jury - 12 on behalf of the plaintiff and 14 for defendants. The court refused two instructions tendered by plaintiff and seven of those tendered by defendants. We think the jury was fully and properly instructed.

The judgment of the Circuit court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

1. Содержание 1.1. Введение 1.2. Описание 1.3. Заключение

42553

MARION HALL GALTER,
Appellee,

v.

LOUIS GALTER,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 297

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a divorce decree finding him guilty of adultery and ordering him to pay alimony and attorneys' fees to plaintiff.

The parties were married in January 1939, lived together until September 23 of that year; a child was born to plaintiff in January of 1940. In February 1940 plaintiff filed a complaint for separate maintenance. Defendant filed his answer and a counterclaim for divorce, charging plaintiff with adultery and denying paternity of the child born to her. All pleadings were stricken. Plaintiff filed an amended complaint for separate maintenance. Defendant answered, and again filed a counterclaim similar to the one formerly filed. Plaintiff filed a motion to dismiss the counterclaim, but no order was entered thereon. She later filed her amended and supplemental complaint for divorce, charging defendant with adultery in July 1941 at the City of New York. The decree appealed from was entered on a hearing before the chancellor without a jury on this complaint, finding the defendant guilty of adultery as charged, and that "the charges of misconduct contained in the defendant's cross-complaint are unfounded, unproved, untrue and twice withdrawn while pending in court." Defendant was directed to pay to plaintiff \$65 per month as and for alimony for herself and maintenance of the minor child of the parties, \$1,500 as



... of ability and ... to plaintiff.

The parties were married on January 1910, ... until separation in 1915. In January 1916, ...

Defendant answered, and also filed a counterclaim ... one formerly lived. Plaintiff filed a motion to ...

... with ability in July 1917 at the age of 18 years. ...

... out a jury on this complaint, reading the ...

... in the defendant's cross-examination ... and the ...

to pay to plaintiff ... and maintenance of the minor ...

2.

attorneys' fees, and the further sums of \$200, remaining unpaid on a prior order for attorneys' fees, and \$110 arrearage in temporary alimony.

Plaintiff's charges of adultery are based upon the testimony of a private detective and a friend, who is also the wife of plaintiff's New York lawyer, under whose direction the private detective was working. This testimony is denied by the defendant. Viewed in a light most favorable to plaintiff it tends to show that on the evening of July 31, 1941, defendant and a lady typist went to his suite in the Concord Hotel, a reputable residential hotel, consisting of a living room, a bedroom with twin beds, and a bath. Defendant, who was in the advertising business, claims that he dictated to the typist three letters to persons in Chicago, and other work connected with his business; that it was an exceedingly hot night; that he had off his coat, his collar was unbuttoned and he was wearing a pair of Mexican slippers; during the dictation the typist kicked off her shoes; the work was finished about 11 o'clock; a sudden rain storm came up and the typist waited for it to subside. At this time plaintiff's witnesses knocked upon the door of the suite. Defendant claims that the door was open and that he immediately asked them to come in. Plaintiff's witnesses say that the door was closed and they waited a minute or so before defendant came to the door. All witnesses agree that defendant and the typist were fully dressed, except that plaintiff's witnesses say the typist was putting on her shoes and adjusting her waist. The wife of the New York lawyer went into the bedroom and found no indications of the beds having been occupied. There was a divan in the living room, and according to plaintiff's witnesses someone had been using it. Upon this evidence the court found the defendant guilty of adultery. It is purely circumstantial and does not meet the requirements of the law. Hoef v. Hoef, 323 Ill. 170; Fowler v. Fowler, 315 Ill. App. 270.

3.

Defendant insists that the trial court erred in finding the charges in the counterclaim unsupported by the evidence, because plaintiff's motion to dismiss the counterclaim had not been disposed of and that leave to withdraw the counterclaim had been granted. At the beginning of the trial plaintiff's counsel stated that the pleadings consisted of a supplemental complaint, charging adultery, and a cross-complaint, also charging adultery. Defendant's counsel stated he did not understand that there was a cross-complaint on file. The court proceeded to hear evidence. Defendant testified on direct examination to certain facts upon which he based his charges of adultery against plaintiff and his denial of paternity of the child born to her, and was cross-examined at length. At the close of that session of the trial the court stated, "Before we end I will say the charges of adultery against this woman are going to be set aside because they are unfounded and unwarranted." At the opening of the next session defendant's counsel asked, for the purpose of the record, if the counterclaim did not appear to be withdrawn, to withdraw same, and the court replied, "Very well. It may be withdrawn." No order of withdrawal was entered.

By going to trial without objection defendant waived his right to claim that issue had not been joined on the counterclaim. Devine v. Chicago City Ry. Co., 237 Ill. 278; Guerin v. Guerin, 270 Ill. 239. After the trial began defendant could not as a matter of right withdraw the counterclaim, which asked for independent, affirmative relief - a divorce from plaintiff. He stood in relation to his counterclaim as a plaintiff in an original action (17 Am. Jur., Dismissal and Discontinuance, §12; Fox v. Pinson, 182 Ark. 936; Clement v. Producers' Refining Co., 270 S. W. (Tex. Civ. App.) 206; Brown v. Butler, 12 N. Y. S. 810), and could dismiss the counterclaim without prejudice only upon complying with section 52 of the Civil Practice Act. Chicago Title & Trust

Defendant insists that the trial court was in error in

the charges in the case, and that the evidence was

because Plaintiff's motion to dismiss the case was

been disposed of by the court, and that the court was

been granted. At the hearing of the trial court's motion

stated that the plaintiff's motion was a motion to

change the charges, and a motion to dismiss the case

Defendant's counsel stated that the court was in error

in disposing of the case. The court was in error in

Defendant's motion to dismiss the case, and that the

which he based his charges of adultery, and that the

defendant's motion to dismiss the case was in error.

examined the facts. At the time of the hearing of the case

court stated, "before we can I will not admit of a

against this woman and going to the fact that the

unknown and unknown. At the hearing of the case, the

defendant's counsel stated, "I am not going to the fact

adultery did not appear to be a fact, and that the

and the court replied, "very well. It was a fact, and

of which we are aware."

By going to the fact, the court was in error in

right to claim that the case was not a fact, and that

Reynolds v. Reynolds, 100 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

and the court stated that the case was not a fact, and that

with respect to the civil practice act, and that the

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Co. v. County of Cook, 279 Ill. App. 462; Warren v. Yost, 317 Ill. App. 79. The oral statement of the court that the counterclaim might be withdrawn did not effect such withdrawal. No order permitting withdrawal was entered of record,^{and} as defendant says in his brief, "A court can only act by orders duly entered in the cause." By its decree finding that the charges of misconduct contained in the defendant's cross-complaint were unfounded, unproved and untrue, the court disregarded the oral permission to withdraw, and the finding in the decree is controlling and proper. Brelsford v. Community High School Dist., 328 Ill. 27; Moore v. Shook, 276 Ill. 37.

Defendant made a demand for trial by jury, but waived the right by proceeding to trial before the court without objection. Sanitary District of Chicago v. Bernstein, 175 Ill. 215; Chicago S. F. & C. R. Co. v. Ward, 128 Ill. 349.

Defendant's next and last objection is that the court erred in allowing plaintiff \$1,500 as attorneys' fees and \$200 as temporary attorneys' fees. The order for temporary attorneys' fees was approved in writing by the parties to this suit and their counsel. Defendant cannot now object to it. Objection to the allowance of the \$1,500 is based upon the contention that application for attorneys' fees must be made in advance of the final hearing, that this was not done, and that the award is excessive and not based upon competent evidence. The first objection is unfounded in fact. The supplemental record shows that the motion for attorneys' fees was continued to the trial of the case.

The evidence as to defendant's ability to pay attorneys' fees is limited to his own testimony, which fixes his present income at something below \$1,000 a year. While this evidence is unconvincing and the court was correct in finding that he "is a man of resourcefulness and capable of earning large sums of money,"

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there was no attempt to prove in a legal way the extent of the services or their value. In response to a question from the court the attorney for plaintiff stated that the fee of the New York lawyers was \$200 and something, and he ventured to say that he had spent 300 hours in the case and would take \$5 an hour on the basis of that many hours and would pay the lawyers in New York and the expense of the depositions out of that. On this showing a fee of \$1,500 was allowed. There is no testimony in the record as to the expenses of the depositions in New York, nor as to the reasonableness of the fee charged by the lawyers there. There was no attempt to prove, even in an informal way, the services rendered by Chicago counsel for plaintiff, and the cases cited by plaintiff as to waiver of the oath of a witness are not applicable. And though the trial court may take into consideration its knowledge of the value of services rendered, it cannot know what services are rendered unless testimony is presented to it. Services covering 300 hours would be services of 60 days of five hours each, and as the trial lasted only a few days, evidence should have been offered covering the services not within the knowledge of the court. The number of hours claimed is unreasonable, and leaves little time for attention to other business.

The decree of the trial court finding the defendant guilty of adultery is reversed, as is that portion of the decree allowing plaintiff permanent alimony and \$1,500 attorneys' fees. In all other respects the decree is affirmed and the cause is remanded with directions to proceed with respect to the allowance of attorneys' fees in accordance with this opinion.

REVERSED IN PART, AFFIRMED IN PART
AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

there was no attempt to show in a formal way that the
 receipts on their value. In substance it is a question of the
 the quantity for plaintiff's goods they bought in the past and
 latter has paid and received, and the balance of the past of the
 about 300 hours in the past and about 300 hours in the past
 of that many hours and about 300 hours in the past and the
 expense of the defendant was 300. Of this amount 150 of
 15,000 was allowed. There is no attempt in the record to
 the expense of the defendant is 15,000, but it is not
 allowed of the 15,000 of the defendant. There is no
 attempt to prove, even in an indirect way, that the defendant
 by Chicago cannot for plaintiff, and the case is not
 as to matter of the fact of a balance and the defendant.
 though the trial court was not authorized to do so
 of the value of plaintiff's property, it cannot show that plaintiff
 received unless plaintiff is authorized to do so. Plaintiff's
 300 hours would be received in the past of the past and the
 the trial lasted only a few days, and the record shows that
 covering the plaintiff's value, the defendant is the court.
 burden of proof is on the defendant, and the record shows that
 attention to other matters.

The issue of the trial court finding the defendant guilty
 of adultery is reversed, and the case is remanded to the lower court
 plaintiff's request for 15,000 is reversed, and the case is remanded
 with directions to proceed with the trial in the manner of
 attorneys' fees in accordance with the opinion.

REVEREND J. J. CONNOR, JUDGE
 AND HONORABLE J. J. CONNOR, JUDGE

42588

CHARLES C. MILLER,
Appellee,

v.

WALTER J. CUMMINGS and DANIEL C.
GREEN, as Receivers, etc.,
et al., doing business as
Chicago Surface Lines,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 297

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants' appeal from a judgment of \$7,000 rendered in favor of plaintiff for injuries sustained by him in attempting to board an east bound Irving Park Road street car when transferring from a north bound Southport avenue car.

The complaint charges "that when defendants' said street car reached the west side of said Southport avenue it stopped at the regular stopping place for the purpose of allowing passengers to alight from and to board their said street car there;" that plaintiff "attempted to and was in the act of boarding defendants' said street car at the rear platform thereof as said street car stopped at the west side of said intersection for said purpose;" and charges defendants with negligence in starting and moving the street car "from its standing position at said intersection." Defendants' answer denies all charges of negligence and avers that "plaintiff started to board said street car after it had started to move from its standing position at the stopping place in question, *** and that said street car was continuing in motion and had left said stopping place when plaintiff started to board said street car."

Plaintiff and a passenger on the Irving Park car called by him testified that the street car came to a full stop, with the front end at the west building line of Southport avenue; that it started up and came to a full stop with its front end somewhere

GEORGE O. LINDEN

Attorney

v.

WALTER J. BOWLING and
GRACE, as Receivers, etc.,
et al., doing business as
Chicago Electric Lines,
Defendants.

MR. JUSTICE BREWER delivered the opinion of the court.

Defendants appeal from a judgment of the Circuit Court in favor of Plaintiff for injuries sustained by her in boarding an east bound trolley from a north bound trolley.

The complaint charges "that when defendant said to plaintiff 'attempted to get on the car' and to board trolley which was stopped at the regular stopping place for the purpose of allowing passengers to alight from and to board trolley which was stopped at the west side of said intersection, defendant charged defendant with negligence in standing and leaving the street car 'from its standing position at said intersection.' Defendant, answer denies all charges of negligence and says that 'plaintiff started to board said street car after it had stopped to move from its standing position at the standing place in question, and that said street car was continuing to move and was left said stopping place when plaintiff started to board said street car.' Plaintiff and a passenger on the trolley which was called by him testified that the street car was to a full stop, with one front end at the west building line of intersection; that it started up and came to a full stop at its front end between

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west of the south bound street carvtrack on Southport avenue; that while the car was standing still on this second stop plaintiff attempted to board it; that it started suddenly with a jerk and he was thrown to the ground and injured. Defendants' witnesses - the motorman and conductor, a passenger on the north bound Southport avenue car with plaintiff, a passenger on the east bound Irving Park car, and an automobilist driving east immediately behind the street car - testified that the street car was crossing Southport avenue at a speed not exceeding 8 or 10 miles an hour when plaintiff attempted to board it.

Defendants insist that there is a variance between the proof and the allegations of the complaint. Their argument is based upon the claim that the street car was not at the regular stopping place when plaintiff attempted to board it. In United Cork Companies v. Volland, 365 Ill. 564, 573, the court said: "It is to be remembered that a variance between allegations and proof, in order to be fatal, must be substantial and material. We have repeatedly applied this rule both at law and in equity. (Street v. Thompson, 229 Ill. 613; Hills v. McMunn, 232 id. 488; Mills v. Larrance, 217 id. 446; Toledo, Wabash and Western Railway Co. v. Thompson, 71 id. 434.)" We do not consider the alleged variance material. Defendants were not misled or in any way harmed by plaintiff's allegations. In their answer they set up the defense that plaintiff had attempted to board a moving street car, and they tried the case upon the theory that plaintiff's claim was based upon the charge that he attempted to board the street car while it was standing still, and not upon the extremely narrow position now taken that it was standing still at the regular stopping place for receiving and discharging passengers west of Southport avenue. At the request of defendants the court instructed the jury as follows: "You are instructed that the plaintiff in this case seeks to recover upon the sole ground that he attempted to board the car in question while said

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[illegible]

...that the plaintiff in this case seeks to recover from the defendant the sum of \$100,000.00, which is the amount of the loss sustained by the plaintiff as a result of the defendant's negligence in failing to maintain the safety of the premises. The plaintiff alleges that the defendant's negligence was the proximate cause of the plaintiff's injury and the resulting loss. The plaintiff seeks to recover the full amount of the loss, plus interest and costs. The defendant denies the plaintiff's allegations and seeks to have the claim dismissed. The court has jurisdiction over this matter. The case is set for trial on the date mentioned in the summons.

3.

car was standing still, and that while he was doing so the car started up from a standstill and caused him to be injured; and you are instructed that he cannot recover in this case unless he has proven that particular ground of recovery by a preponderance or greater weight of all the evidence in the case, and if he has failed so to do, you should find the defendants not guilty." In fixing defendants' liability it was immaterial whether the car was standing still at the regular stopping place or at the second stop testified to by plaintiff and his witness. As said in West Chicago Street R. Co. v. Manning, 170 Ill. 417, 423: "Moreover, we incline to the view that whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion the duty is cast upon those in charge of the car of exercising proper and reasonable care for the safety of passengers. It is within common knowledge and observation that passengers enter and alight from street cars at or near the crossings of streets, and that street cars stop at street intersections for the purpose of receiving and discharging passengers. If a car is brought to a stop at or near such crossings, it is not unreasonable to charge the conductor and grip-man in control of the car with notice that passengers may avail themselves of the opportunity thus presented for leaving the car, and also with the duty of exercising a reasonable degree of care, before putting the car again in motion, to see that passengers seeking ingress into or egress from the car are not in such positions as to be endangered by putting the car again in motion." To the same effect are North Chicago St. R. Co. v. Eldridge, 151 Ill. 542; Chicago West Division Ry. Co. v. Mills, 105 Ill. 63, 72; Aur v. East St. Louis Ry. Co. 194 Ill. App. 193; West Chicago St. R. Co. v. Luke, 72 Ill. App. 60.

Defendants also insist that the verdict of the jury is against the manifest weight of the evidence. The preponderance of the evidence is not determined solely by the number of witnesses. Harre v.

and was standing still, and that while he was going to the car
started up from a standing still and moved into the car; and
you are instructed that in such a case the jury should
in fact prove that defendant moved in front of a moving
or greater weight of all the evidence in the case, and if he did
failed so to do, you should find the defendant not guilty. In
finding defendant guilty, liability is not established unless the jury
is finding still of the evidence showing that he was in the car
standing to a plaintiff and his witness. It is to be found
that I. O. v. [illegible] 190 Ill. App. 117, 118; [illegible] 190 Ill.
to the view that defendant's action was in fact a
crossing of the street, where the car was then and it was
is not that there is a lack of knowledge of the fact of crossing the street
responsible for the action of the defendant. It is to be found
knowledge and observation that defendant was in the car
street and it is not the knowledge of the fact of crossing the street
case that of such a case the defendant is to be found
and defendant's liability. It is to be found that a jury of men
that such crossing, it is not sufficient to show the fact of
and find him in control of the car and that the defendant was
avail themselves of the opportunity to cross the street and
out, and also with the fact of crossing the street and
case, before plaintiff's car was in motion, it was not necessary
and find him in control of the car and that the defendant was
as to be established by the evidence in the case. It is to be found
some effect on the [illegible] 190 Ill. App. 117, 118; [illegible] 190 Ill.
Chicago West Division No. 1, 190 Ill. App. 117, 118; [illegible] 190 Ill.
St. Louis No. 1, 190 Ill. App. 117, 118; [illegible] 190 Ill.
190 Ill. App. 117, 118.

Defendants also insist that the weight of the evidence is against
the plaintiff's claim of the evidence. The weight of the evidence
there is not determined solely by the amount of evidence. [illegible]

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Fayette County Mut. Tel. Co., 284 Ill. App. 292; Bowers v. Heflebower, 243 Ill. App. 129. In the present case the evidence is in direct conflict. The jury chose to believe the plaintiff and his witness. The trial court, who heard and observed the witnesses when testifying, has approved the verdict. We are not justified on the printed record in substituting our judgment for theirs.

Defendants complain of the giving of three instructions tendered by plaintiff. It is necessary to consider only the giving of plaintiff's instruction No. 6 relating to damages. This instruction told the jury that "In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proved by the preponderance of the evidence before them, the nature and extent of plaintiff's physical injuries, if any, ** his pain and suffering, if any, ** all moneys necessarily expended or which he has become liable for on account of all reasonable medical and hospital bills incurred, if any, **." Defendants' objection is that under this instruction in determining the amount of damages the jury "had the right to and should take into consideration all the facts and circumstances as proved by the preponderance of the evidence before them, without limiting such facts and circumstances to such as pertained to the question of damages." Plaintiff concedes that this objection may be technically correct, but says that defendants were in no sense prejudiced by the instruction. The giving of similar instructions has been condemned as reversible error in cases where the damages awarded were apparently excessive. Pate v. Gus Blair Big Muddy Coal Co., 158 Ill. App. 578, 584-5; Levitan v. Chicago City Ry. Co., 203 Ill. App. 441, 443; Illinois Central R. Co. v. Johnson, 221 Ill. 42, 49-50. In the present case plaintiff sustained a fracture of the right femur, which resulted in shortening the leg 1/2 inch; he

1. Source: 1947-1948 ; 1949 ; 1950 ; 1951 ; 1952 ; 1953 ; 1954 ; 1955 ; 1956 ; 1957 ; 1958 ; 1959 ; 1960 ; 1961 ; 1962 ; 1963 ; 1964 ; 1965 ; 1966 ; 1967 ; 1968 ; 1969 ; 1970 ; 1971 ; 1972 ; 1973 ; 1974 ; 1975 ; 1976 ; 1977 ; 1978 ; 1979 ; 1980 ; 1981 ; 1982 ; 1983 ; 1984 ; 1985 ; 1986 ; 1987 ; 1988 ; 1989 ; 1990 ; 1991 ; 1992 ; 1993 ; 1994 ; 1995 ; 1996 ; 1997 ; 1998 ; 1999 ; 2000 ; 2001 ; 2002 ; 2003 ; 2004 ; 2005 ; 2006 ; 2007 ; 2008 ; 2009 ; 2010 ; 2011 ; 2012 ; 2013 ; 2014 ; 2015 ; 2016 ; 2017 ; 2018 ; 2019 ; 2020 ; 2021 ; 2022 ; 2023 ; 2024 ; 2025 ; 2026 ; 2027 ; 2028 ; 2029 ; 2030 ; 2031 ; 2032 ; 2033 ; 2034 ; 2035 ; 2036 ; 2037 ; 2038 ; 2039 ; 2040 ; 2041 ; 2042 ; 2043 ; 2044 ; 2045 ; 2046 ; 2047 ; 2048 ; 2049 ; 2050 ; 2051 ; 2052 ; 2053 ; 2054 ; 2055 ; 2056 ; 2057 ; 2058 ; 2059 ; 2060 ; 2061 ; 2062 ; 2063 ; 2064 ; 2065 ; 2066 ; 2067 ; 2068 ; 2069 ; 2070 ; 2071 ; 2072 ; 2073 ; 2074 ; 2075 ; 2076 ; 2077 ; 2078 ; 2079 ; 2080 ; 2081 ; 2082 ; 2083 ; 2084 ; 2085 ; 2086 ; 2087 ; 2088 ; 2089 ; 2090 ; 2091 ; 2092 ; 2093 ; 2094 ; 2095 ; 2096 ; 2097 ; 2098 ; 2099 ; 2100 ; 2101 ; 2102 ; 2103 ; 2104 ; 2105 ; 2106 ; 2107 ; 2108 ; 2109 ; 2110 ; 2111 ; 2112 ; 2113 ; 2114 ; 2115 ; 2116 ; 2117 ; 2118 ; 2119 ; 2120 ; 2121 ; 2122 ; 2123 ; 2124 ; 2125 ; 2126 ; 2127 ; 2128 ; 2129 ; 2130 ; 2131 ; 2132 ; 2133 ; 2134 ; 2135 ; 2136 ; 2137 ; 2138 ; 2139 ; 2140 ; 2141 ; 2142 ; 2143 ; 2144 ; 2145 ; 2146 ; 2147 ; 2148 ; 2149 ; 2150 ; 2151 ; 2152 ; 2153 ; 2154 ; 2155 ; 2156 ; 2157 ; 2158 ; 2159 ; 2160 ; 2161 ; 2162 ; 2163 ; 2164 ; 2165 ; 2166 ; 2167 ; 2168 ; 2169 ; 2170 ; 2171 ; 2172 ; 2173 ; 2174 ; 2175 ; 2176 ; 2177 ; 2178 ; 2179 ; 2180 ; 2181 ; 2182 ; 2183 ; 2184 ; 2185 ; 2186 ; 2187 ; 2188 ; 2189 ; 2190 ; 2191 ; 2192 ; 2193 ; 2194 ; 2195 ; 2196 ; 2197 ; 2198 ; 2199 ; 2200 ; 2201 ; 2202 ; 2203 ; 2204 ; 2205 ; 2206 ; 2207 ; 2208 ; 2209 ; 2210 ; 2211 ; 2212 ; 2213 ; 2214 ; 2215 ; 2216 ; 2217 ; 2218 ; 2219 ; 2220 ; 2221 ; 2222 ; 2223 ; 2224 ; 2225 ; 2226 ; 2227 ; 2228 ; 2229 ; 2230 ; 2231 ; 2232 ; 2233 ; 2234 ; 2235 ; 2236 ; 2237 ; 2238 ; 2239 ; 2240 ; 2241 ; 2242 ; 2243 ; 2244 ; 2245 ; 2246 ; 2247 ; 2248 ; 2249 ; 2250 ; 2251 ; 2252 ; 2253 ; 2254 ; 2255 ; 2256 ; 2257 ; 2258 ; 2259 ; 2260 ; 2261 ; 2262 ; 2263 ; 2264 ; 2265 ; 2266 ; 2267 ; 2268 ; 2269 ; 2270 ; 2271 ; 2272 ; 2273 ; 2274 ; 2275 ; 2276 ; 2277 ; 2278 ; 2279 ; 2280 ; 2281 ; 2282 ; 2283 ; 2284 ; 2285 ; 2286 ; 2287 ; 2288 ; 2289 ; 2290 ; 2291 ; 2292 ; 2293 ; 2294 ; 2295 ; 2296 ; 2297 ; 2298 ; 2299 ; 2300 ; 2301 ; 2302 ; 2303 ; 2304 ; 2305 ; 2306 ; 2307 ; 2308 ; 2309 ; 2310 ; 2311 ; 2312 ; 2313 ; 2314 ; 2315 ; 2316 ; 2317 ; 2318

[illegible][illegible]

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was confined to the hospital for 9 weeks, getting out of bed during the last week for the purpose of learning to walk with a caliper; he used this caliper about 3 months after returning home, and at the time of the trial was using a cane when on the street; when he walks three or four blocks the leg becomes swollen from the knee down; he had suffered from a hernia and wore a truss; there is evidence that the hernia was aggravated by the accident; he was 69 years of age, had retired and was receiving a pension from his former employers; his total medical and hospital bills were at least \$300. Defendants contend that the damages awarded - \$7,000 - are excessive. We do not so consider them, and for this reason do not hold that the giving of the instruction relating to damages is reversible error.

The judgment of the Circuit court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

...the

10. 10. 1963

42599

RICHARD J. GEBEL,
Appellee,
v.
H. FRED WILSON,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

323 I.A. 298

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$714 entered by confession upon his promissory note for \$600, payable to plaintiff on demand.

Upon petition filed defendant was given leave to defend, the judgment to stand as security and the petition as an affidavit of defense. This petition alleged that at the time of the execution of the note defendant was engaged in the proposed organization of a national bank and that "plaintiff advanced certain moneys represented by said note, not to this affiant personally, but only for use in connection with the organization of said bank and in connection with expenses pursuant thereto and that said note was delivered on or about the date it bears, representing said money so given, with the express agreement and understanding that the said note was delivered conditionally and was not to be effective or paid unless and until the said bank was organized." A hearing was had before the court without a jury, resulting in a finding for the plaintiff of the amount due him at the time of the confession of \$714, being \$600 - the principal of the note, \$99 interest, and \$15 attorney's fees, and final judgment was entered.

On the issue raised the burden of proof rested upon defendant, and the evidence to establish a conditional delivery of a note should be clear, convincing and specific. Cusanelli v. Steele,

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287 Ill. App. 490; Dairyman's State Bank v. Dunham, 271 Ill. App. 249. Plaintiff and defendant each had long experience in banking. Both were working in connection with the proposed organization of a national bank and were to receive salaries, which were never paid. Plaintiff testified that about the time of the execution of the note defendant wanted to borrow \$1,000 upon a note, to be guaranteed by Mr. Hintz; that the latter refused to guarantee the note and plaintiff finally agreed to and did make a loan of \$500 to defendant, taking from him the note sued upon, which included \$100 previously loaned. Defendant's testimony is to the effect that he was devoting all of his time to the organization of the bank; that he had not received his salary and, being in need of funds, was about to abandon the enterprise; that plaintiff then advanced \$500, which was to be applied on defendant's salary, and took the note upon which judgment was entered, it being expressly understood that defendant should never be asked to pay the note; that when and if the bank was organized and defendant's salary allowed as an organization expense, plaintiff would be reimbursed. There is conflicting evidence in the record in respect to certain books kept in connection with the organization of the bank, and also the testimony of one of the organizers of the bank of inquiries made by the plaintiff as to the likelihood of having advances made by him for the benefit of the bank repaid upon its organization. The question before the court was purely one of fact, to be determined primarily upon the testimony of the plaintiff and the defendant. The trial court, who had the benefit of hearing the testimony and observing the witnesses upon the stand, decided in favor of the plaintiff. As before stated, the burden rested upon the defendant. The finding of the trial court is not against the manifest weight of the evidence, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

42672

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

HERMAN KAMINSKY, et al.,
Plaintiffs in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

323 I.A. 293

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment of conviction of conspiracy to defraud, etc. Herman and Karl Kaminsky, father and son, were each fined \$1,000, and Rachel Goldenberg, niece of Herman, and her husband Louis were each fined \$250.

The charge arose out of an alleged will of Jacob Kaminsky, brother of Herman, in the handwriting of Karl above the genuine signature of Jacob on the inside wrapper of a Chesterfield cigarette package, witnessed by the Goldenbergs and offered for probate by Herman. Jacob left an estate of approximately \$20,000. The will was as follows: "I am leaving my brother Herman Kaminsky 50% of my money and he also has \$2400 which is in my box. I am going to leave the property at 417 Monroe St. to Karl Kaminsky. I am doing this because they took care of me." The case was tried before the court without a jury. Over 80 witnesses were examined, about 30 being character witnesses. Defendants' principal contention is that the prosecution failed to establish guilt beyond a reasonable doubt.

Jacob Kaminsky was divorced in 1924 and, for a time at least, there was ill feeling between him and his children. At the time of the execution of the alleged will Jacob occupied rooms above the grocery store of Herman. On November 26, 1940, the date appearing on the will, Herman took Jacob to Dr. Sayre for an examination, and also took him to the office of a lawyer for the purpose

THE PROPOSAL ON THE PART OF THE DEFENDANT

v.

HARRIS KAMIN, et al.,
Plaintiffs in Error.

SHOWN TO
MAY 1907
JULY 1907

R. JUSTICE

Defendants appeal from a judgment of summary
to defend, etc. Harris and Kamins, et al., with
each fined \$1,000, and costs of appeal, and
her husband Louis was each fined \$1,000.

The charge against all of the defendants was
brother of Herman, in the indictment it was shown
signature of Jacob on the inside of a letter from
package, witnessed by the defendants and others for
Herman. Jacob left an estate of approximately \$20,000. The will
was as follows: "I am leaving my entire estate of
my money and he also has \$100,000 in my box. I am going to
leave the property at my house at 10 West 10th Street. I am doing
this because they took care of me." The case was tried before the
court without a jury. Both sides presented expert testimony
being character witnesses. Defendant's counsel contended
that the prosecution failed to establish guilt beyond a reasonable
doubt.

Jacob Kamins was divorced in 1901, for a wife named
there was ill feeling between him and his children. At the time
of the execution of the will, Jacob was living alone
the grocery store of Herman. On November 20, 1907, the date
appearing on the will, Harris took Jacob to Dr. Kahn for an exami-
nation, and also took him to the office of a lawyer for the purpose

2.

of having a will executed. The lawyer was not in and Jacob did not return. Shortly thereafter Jacob was taken to the Billings Hospital, where he died on the morning of December 16, 1940. Herman and Jacob each had safety deposit boxes at the Milwaukee Avenue Safety Deposit Company. An attendant whose duty it was to open the safety deposit boxes testified that on December 2, 1940 Herman and Jacob asked for a large room, which was given them; they were in the room maybe half an hour; that he heard Jacob say, "Listen, I don't believe you, I don't trust you, you cheat me;" that on December 10 Herman asked the witness to open the box and that he, Herman, would sign the ticket for his brother Jacob, and said, "You open the box. I will not forget you." The manager of the safety deposit company testified that between the 2nd and 11th of December Herman told the witness that his brother, who was ill in the hospital, wanted him, Herman, to go into his box to withdraw some papers, and was told that he would have to take a power of attorney to Jacob and have him sign it; that shortly after 9 o'clock on December 16 the witness again saw Herman, who told him that he just learned that Jacob had died and showed a key to Jacob's box and asked to get into it, and was told it could not be done; Herman then said there was some money in there belonging to him, and, "I will give you \$500 to let me get into that box without making a record that I was there. *** If you don't let me in I will have a lot of trouble. It is my money." Later Herman said, "Well. if you can't do it, forget all about it. I will try some other way."

Children of Jacob testified that on the night of December 16 at the home of Herman, at which all the children of Jacob - 9 in number - were present, and Herman's son Karl, Herman said he had gotten them together to tell them about the father, who had not left a will but wanted Herman to take care of his money; that Jacob told him to give \$1,000 to his, Herman's, daughter; that he wanted

of having a will executed. The lawyer was told by Jacob that not return. Shortly thereafter Jacob was taken to the hospital, where he died on the morning of December 13, 1940. Herman and Jacob each had safety deposit boxes at the 1140 Avenue Safety Deposit Company. An independent witness came to the 1140 Herman and Jacob asked for a large room, which was given them; they were in the room with the witness; that is what Jacob said, "Listen, I don't believe you, I don't believe you, you chest is." That on December 10 Herman asked the witness to open the box and that he, Herman, would sign the ticket for the witness. Jacob, and said, "I will not sign the box. I will not sign the box." The witness of the safety deposit company testified that between the 2nd and 11th of December Herman told the witness that the witness who was all in the hospital, Herman said, Herman, to go into the box to withdraw some money, and Herman told him to go into the box to take a power of attorney to Jacob and to sign it; that shortly after 3 o'clock on December 10 the witness signed the power, and told him that he just learned that Jacob had died and showed a key to Jacob's box and asked to get into it, and was told it could not be done; Herman then said there was some money in there before him to him, and, "I will give you \$500 to get me into that box without making a record that I was there. And if you don't let me in I will have a lot of trouble. It is my money." Herman said, "All right, if you can't do it, forget all about it. I will try some other way."

Children of Jacob testified that on the night of December 10 at the home of Herman, at which all the children of Jacob - 9 in number - were present, and Herman's son, Herman said he had gotten them together to tell them about the father, and had not left a will but wanted Herman to take care of his money; that Jacob told him to give \$1,000 to his daughter, and Herman said that he wanted

3.

Karl to have the property on Monroe street; and that Herman said, "I will give each of you \$500 and I want to handle everything. I am sure your father never made a will. He never went to see Kastongren. I was after him to go up there." A son of Jacob testified that at this meeting at Herman's home the witness asked for his father's clothes, and in turning over a shopping bag a paper fell out; that his father's name was on the paper and no other signatures. He identified this paper as the paper on which the will was written and said it was placed back in a coat; that the defendant Karl was present.

A lawyer practicing in Hammond, Indiana testified that Jacob's property on Monroe street in Gary was under contract of sale; that a payment of \$100 on account of the purchase was made in September 1940, and a further payment of \$200 later; that no deed had been executed by Jacob; that between December 20 and Christmas 1940, Herman and Karl came to the witness' office in Hammond and produced the paper received in evidence as Jacob's will; that at that time the words "Witnessed by Louis and Rae Goldenberg" were not on there; that he is not positive whether or not the words "Nov. 26, 1940" were on the paper; it did not bear the file mark of the probate clerk of Cook County; that witness told Herman and Karl the paper was not valid as a will - that it was not witnessed, and even if it had been witnessed he had some doubt about the language "I am going to leave the property at 417 Monroe St. to Karl Kaminsky" being sufficient as a testamentary devise.

Several witnesses called as experts by the prosecution testified that in their opinions four or possibly five pencils were used in the preparation of the will; the body of the will is crowded into one-third of the paper above the signature of Jacob, while two-thirds of the paper left for the signatures of the witnesses and the date; that the body of the will and the names of the witnesses

Karl to have the property on some other; and that Herman said, "I will give each of you \$500 and I want to handle everything. I am sure your father never made a will. He never went to see Kaskofgren. I see after him to go to court. I am of legal age testified that at this meeting at Herman's home the witness asked for his father's clothes and in turning over a suitcase bag a paper fell out; that this father's name was on the paper and no other signatures. He identified this paper as the paper on which the will was written and said it was signed and in a court; that the defendant Karl was present.

A lawyer practicing in London, England testified that Jacob's property on some street in New York was under contract of sale; that a payment of \$100 on account of the purchase was made in September 1940, and a further payment of \$100 later; that no deed had been executed by Jacob; that between December 1940 and Christmas 1940, Herman and Karl came to the witness' office in Hammond and produced the paper believed in evidence as Jacob's will; that at that time the words "Witnessed by Louis and the defendant" were not on there; that he is not positive whether or not the words "Nov. 26, 1940" were on the paper; it did not say the full name of the Probate Clerk of Cook County; that witness told Herman and Karl the paper was not valid as a will - that it was not witnessed, and even if it had been witnessed he had some doubt about the language "I am going to leave the property at my home to, to Karl Kaskofgren" being sufficient as a testamentary devise.

Several witnesses called as experts by the prosecution testified that in their opinions four or possibly five pencils were used in the preparation of the will; the body of the will is crowded into one-third of the paper above the signature of Jacob, while two-thirds of the paper left for the signatures of the witnesses and the date; that the body of the will and the names of the witnesses

4.

were written at a later date than the signature of Jacob, and the date (Nov. 26, 1940) at a later date than the body of the will.

The testimony on behalf of defendants is that on the night of November 26 Jacob tapped on the floor above the grocery store of Herman; that Karl went upstairs and was told by Jacob to write the will, as later introduced in evidence; that the Goldenbergs were present at the time and witnessed the will; that a day or two after the death of Jacob, Herman found the will in a prayer book; that it was then in the completed form, as offered for probate and received in evidence on the trial of this case; that he took the will to a lawyer and later tendered it for probate. Herman admits a conversation with the manager of the safe deposit company on December 16th. He says they talked about \$2400 in Jacob's box which he claimed, and that he offered to put up \$500 which he should lose if the \$2400 wasn't in his name.

The number of disinterested witnesses, other than the character witnesses for defendants, testifying on behalf of the prosecution is greater than that called on behalf of defendants, and the facts covered by their testimony are of greater probative value than those testified to by defendants' witnesses. The credibility of these witnesses is primarily for the trial court. He accepted the testimony of the state's witnesses. We cannot say that he erred in so doing. This testimony established the guilt of the defendants beyond a reasonable doubt.

Other objections are urged here by defendants, but we do not regard them as tenable. The indictment is sufficient, the rulings of the court on the admission and rejection of testimony are substantially correct, and the charge of prejudicial conduct by the assistant state's attorney is not supported by the record.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

42731

HOWARD C. MEISSNER,
Appellee,
v.
JOSEPHINE MEISSNER,
Appellant.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

323 I.A. 299

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant and counterclaimant, appeals from an order modifying a decree of divorce entered on her counterclaim by changing the care, custody and control of the minor children, Robert and Cary, from her to the father.

In July 1939 the decree was entered awarding the custody of the children to the counterclaimant and directing the plaintiff as counterdefendant to pay \$68 a month for the support of the children. In December 1940 an order was entered directing counterclaimant to enrol the children in a parochial school and, upon the voluntary agreement of plaintiff to increase the support money \$10 a month on the representation of defendant that she would discontinue her employment and devote her full time to the children, plaintiff was ordered to pay \$78 per month. In February 1943 plaintiff filed his petition alleging his voluntary agreement to increase the support money payments to \$78 per month, but omitting any allegation of payment of said sum, and that on or about June 25, 1942 defendant took the children out of the jurisdiction of the court without first receiving an order allowing her to do so; that an attachment was issued for defendant on October 16, 1942; and praying for an order directing the defendant to return the children to the jurisdiction of the court, and, upon her failure to do so, that the sole care and custody of the children be granted to petitioner.

HOWARD G. WILSON,
 Plaintiff,
 v.
 JOSEPHINE WILSON,
 Defendant.

82 A 202

IN JUDICIAL PROCEEDINGS

Defendant and counterclaimant, hereby files and
 exhibits a decree of divorce entered in the Superior Court
 of the State of Oregon, dated and entered on the 10th day of
 August, 1934, in Case No. 10,000, in which said divorce
 Robert and Mary, then and now deceased,

In July 1934, the parties were residing in the county
 of the children to the defendant and defendant the children
 as co-defendant to the plaintiff and the children in the
 children. In December 1934 an order was entered in the
 court to send the children to a parochial school and, upon the
 voluntary agreement of the father to do so, the mother, in
 a month on the representation of defendant and the wife discon-
 tinued her employment and moved with the children to the
 city and ordered to pay the father the sum of \$100.00
 filed the petition and the voluntary agreement to do so and the
 support money payable to the father, but defendant and defendant
 of payment of said sum, and that on or about June 22, 1935, defendant
 took the children out of the jurisdiction of the court without
 first receiving an order allowing her to do so, and an order
 was issued for defendant on October 12, 1935, and return for an
 order directing the defendant to return the children to the father
 of the court, and, upon the return of the children to the father,
 sole care and custody of the children be granted to defendant.

2.

February 26, 1943, defendant filed her answer alleging that she discontinued her employment and devoted her full time to the children until the month of January 1942, at which time plaintiff discontinued the monthly payments for the support of the children, as a result of which defendant was compelled to seek, and did find, employment; that one of the minor children suffered an accident, as a result of which defendant discontinued her employment, and was later evicted from the premises in which she was living with the children; that during this time plaintiff contributed nothing to the support of the children, except certain payments to the attending doctor and to the hospital for medical and hospital services in the treatment of the child which had sustained an accident; that about June 25, 1942, defendant, with the full knowledge, consent and approval of the plaintiff, went with the children to New York to remain until the school term commenced in September 1942, when she was to return with the children to Illinois, plaintiff having promised to forward funds during the vacation period. No reply was filed to this answer. On the following day, without hearing any evidence, the court entered an order reciting that the defendant had failed to appear in person in open court, and awarding custody of the children to the father. At that time, in speaking of the order, the court said: "*** it is not based on any charge that she is an unfit person. It is based on her contempt of this court, and her failure to produce the children here."

Plaintiff has filed a motion to dismiss the appeal, with prejudice, because of the alleged failure of defendant to return to Illinois with the children. This motion has been reserved to the final hearing. The motion to dismiss is based upon the alleged ground that, by taking the children to New York and failing to return, defendant was in contempt of court. There is no denial in the record that the removal of the children was with

February 10, 1881, containing a letter from the
The following are the names of the persons who
collected under the name of the State of Illinois,
discovered the same, and the names of the persons
as a result of whose researches the same were
discovered; that one of the above-named persons is
a result of other persons' researches, and the
later tested from the records in which the same was
collected; that during the time of the collection of the
the report of the collector, which report is in the
the collector and to the Department of the Interior, and
in the Department of the Interior, and the same was
about June 25, 1881, and the same was
and approval of the collector, and it is the policy of the
to provide that the same be returned to the collector, and
the same to return with the collector in Illinois, and the
provision to provide that the same be returned to the collector,
and also to the collector, and the collector, and the collector
any evidence, but such evidence as may be required, and the
and has failed to return to the collector, and the collector
report of the collector is in the record, and the collector
of the record, the report is in the record of the collector,
that the same is a valid report. It is found in the report of the
report, and the collector is ordered to return the same,
collector has failed to return the same, and the collector
collector, because of the alleged failure of the collector to return
to Illinois with the collector. This report is a valid report,
the final report. The report is a valid report,
collector, and the collector is ordered to return the same, and the collector
ing to return, and the collector is ordered to return the same, and the collector
decal in the record of the collector, and the collector is ordered to return the same,

3.

the approval and consent of plaintiff, and he makes no claim of having paid anything toward the support of the children after January 1942. There is in the record a colloquy between court and counsel from which it appears that transportation for defendant and the children was sent to Rome, N. Y. to enable defendant to appear before the court in the proceeding in which the attachment of defendant was ordered in October 1942. Defendant did not receive this transportation. There is no evidence of any offer to make up any of the arrearages in support money or to provide in the slightest degree for the support of the children on the trip to Illinois and during the stay in Illinois pending action by the court. No hearing was ever had upon the alleged contempt of the defendant. Under the circumstances the court erred in entering the order changing the custody of the children. Plaintiff's motion to dismiss the appeal is denied. Even where an appellant is in contempt of court, it is within the discretion of the reviewing court whether or not an appeal shall be heard.

McGowan v. People, 104 Ill. 100; Garrett v. Garrett, 341 Ill. 232.

On the record now before us the equities are with the defendant.

The order appealed from is reversed.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

Abstract

323 I.A. 382

Gen. No. 9925.

Agenda No. 19.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1943.

ROBERT D. SHIELDS, Et Al.,
Plaintiffs-Appellees,
v.
LEE STICKEL, Et Al.,
Defendants-Appellees,
MONARCH FINANCE CORPORATION, a
Corporation,
Defendant-Appellant.

Appeal from
Circuit Court,
Putnam
County.

WOLFE,-- J.

This is an appeal by the Monarch Finance Corporation from a decree entered in the Circuit Court of Putnam County in a partition suit which determined the amount due on a trust deed and note held by the Monarch Finance Corporation for \$1,689.70, plus attorney's fees of \$350.00. The plaintiffs-appellees who are part of the heirs of Henry C. Shields, deceased, filed their Bill for Partition of certain lands in Putnam County, owned by the decedent at his death. All other heirs were made parties defendant. The appellant, the Monarch Finance Corporation,

Abstract

8831A.12

Gen. No. 2630.

IN THE
UNITED STATES COURT OF DISTRICTS
SECOND DISTRICT
SOUTHERN DISTRICT OF NEW YORK

FOR PETITION TO REVOKE, SET ASIDE,
AND REPEAL THE DECISION OF THE
UNITED STATES DISTRICT COURT
IN THE MATTER OF THE
ESTATE OF JAMES H. HARRIS, JR.
DECEASED.

FILED -- 1.

This is an appeal of the decision of the United States District Court for the Southern District of New York, in a petition filed by the respondent, James H. Harris, Jr., deceased, for the revocation, setting aside, and repeal of the decision of the United States District Court for the Southern District of New York, in the matter of the estate of James H. Harris, Jr., deceased, filed their bill for partition of certain lands in New York County, owned by the decedent at his death. All other parties are named parties defendant. The appellant, who was not named as a party,

2.

was joined as a party defendant to the complaint, as the holder of a \$5,000.00 note of Henry C. Shields, secured by a trust deed upon the real estate sought to be partitioned. Prior lien holders were also made parties defendant, but this part of the litigation does not concern this case.

The complaint alleged that there was a partial failure of consideration for the note and trust deed, and that the transaction was usurious and that there was due on said note and trust deed the sum of \$1,689.70 only. The appellant's answer alleged that it was a bona fide purchaser for value, before maturity of the note and trust deed in question from one, George W. Sprenger.

The case was referred to the Master in Chancery to take the proof and report his findings. He found that the Monarch Finance Corporation was a holder in due course of the note and trust deed, which were of the value of \$5,000.00 together with interest at seven per cent; and that \$500.00 had been paid on the note. He also found by the terms of the trust deed that the defendant, the Monarch Finance Corporation, was entitled to reasonable attorney's fees, which he found to be \$350.00. The plaintiffs filed exceptions to the master's report, and alleged that the master erred in finding that the Monarch Finance Corporation was the holder of the note and trust deed in due course; and also alleged that the master erred in considering the testimony of Grace Knight, the bookkeeper and stenographer for the finance corporation, as her answers to

was joined as a party defendant in the December 2, 1916 motion of a \$5,000.00 note of Henry C. Smith, executed to a bank upon the real estate owned by the defendant. Under this motion the real estate would be sold and the proceeds of the sale would be used to pay the note. The motion was also made for the purpose of obtaining a writ of attachment against the defendant. The writ of attachment does not require that the defendant be a party to the motion.

The complaint alleged that there was a partnership between the defendant and the plaintiff in the business of buying and selling real estate. The complaint also alleged that the defendant had received from the plaintiff a sum of \$10,000.00 for the purpose of buying real estate. The complaint further alleged that the defendant had used the money for other purposes and had not returned the money to the plaintiff. The complaint also alleged that the defendant had been negligent in the management of the business and had caused the plaintiff to suffer a loss of \$10,000.00.

The case was referred to the Master in Equity to take the pleadings and report his findings. The Master found that the partnership was a partnership in the management of the business and that the defendant had received from the plaintiff a sum of \$10,000.00 for the purpose of buying real estate. The Master also found that the defendant had used the money for other purposes and had not returned the money to the plaintiff. The Master further found that the defendant had been negligent in the management of the business and had caused the plaintiff to suffer a loss of \$10,000.00. The Master recommended that the plaintiff be awarded the sum of \$10,000.00 with interest and costs. The court affirmed the Master's findings and recommended award.

3.

certain questions were conclusions rather than facts, particularly as to her testimony in which she states that the Monarch Finance Corporation purchased the note and trust deed in question from George W. Sprenger. The Monarch Finance Corporation filed objections to the master's report in fixing its attorney's fees at the sum of \$350.00. The objections to the master's report were ordered to stand as exceptions in the Circuit Court.

The Court sustained the exceptions of the defendant, the Monarch Finance Corporation, and sustained all the exceptions of the plaintiff to the master's report, except the one pertaining to the finding of the master as to the attorney's fees due the defendant, which exception was overruled. The Court found the trust deed in controversy was executed Dec. 19, 1938; that the defendant, the Monarch Finance Corporation, was not a bona fide innocent purchaser of said note secured by said trust deed for value before maturity from George W. Sprenger; that the evidence shows that said defendant is the owner and holder of said note and trust deed; that the defendant paid, as consideration therefor, the sum of \$2,189.70 in payment of the obligations of said Henry C. Shields; that it paid no other sum to Henry C. Shields, nor did it pay any other sum at the direction of Henry C. Shields; that the said Monarch Finance Corporation, by its answer, sought to have said trust deed securing said note decreed to be a lien upon said above described premises in the sum of \$5,000.00, with interest at the rate of seven per cent per annum from date of said note, less the sum of

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4.

\$500.00 paid thereon, by said Henry C. Shields, and that by so doing the defendant, the Monarch Finance Corporation, violated Section 6, Chap. 74 of the Illinois Revised Statutes, and is not entitled to recover any interest on the amount it paid out as consideration for note and trust deed. The Court further found that said trust deed securing said note provided that if the holder of the note and trust deed were made parties of any suit for foreclosure, they were entitled to the reasonable costs and attorney's fees, and the Court found that said Monarch Finance Corporation was entitled to \$350.00 as reasonable attorney's fees in this proceeding.

The Court further found that prior to the hearing in the case, the plaintiffs tendered to the defendant, the Monarch Finance Corporation, \$1,689.70 being the full amount that plaintiffs claimed was due on the note and trust deed. The Court further found that this was not a sufficient tender, as it did not include reasonable attorney's fees, as provided in the trust deed. The Court further found that after the exceptions were passed upon in open Court, the plaintiffs tendered to the defendant the sum of \$2,039.70; that the Monarch Finance Corporation refused such tender, and the Court further found that said sum has been paid to the Clerk of the Court, to be paid to the Monarch Finance Corporation in full satisfaction of the amount due on the said note secured by said trust deed. The Court ordered that the trust deed be fully paid, satisfied and discharged, and the same be no longer a lien on the premises in

5.

question; that the defendant, the Monarch Finance Corporation, deliver the said note to the Clerk of the Court within 5 days of the date of the decree, and the Court ordered that partition of the premises be made, and appointed commissioners for that purpose. It is from this decree that this appeal is prosecuted to this Court.

It is insisted by the appellant that the burden of proof is upon the plaintiffs to prove that the note was usurious and that the defendant was not a holder in due course. The appellees contend that the burden of proof was upon the appellant to prove that matter. Regardless of who had the burden of proof, the record clearly shows that the chancellor was right in his conclusions, which he reached, as set forth in the decree.

An examination of the evidence given by Grace Knight before the master shows that practically every question and answer were objected to by the attorneys for the plaintiffs. She was permitted to testify that the defendant purchased the note in question from George W. Sprenger. This was the question the court had to decide. We think the Court did not err in sustaining exceptions of the plaintiffs in this respect.

It is stipulated by the parties to the suit that if Mr. George W. Sprenger was personally present and called as a witness, he would testify, "that he never had or heard about the \$5,000.00 note in question," which is marked defendant's, the Monarch Finance Corporation, Exhibit A, in his possession; that he did not deliver said Exhibit A, and the trust deed to

6.

the Monarch Finance Company, the defendant herein; that he did not sell Exhibit A to the Monarch Finance Corporation; that after the trust deed was recorded, it was mailed, but not to George W. Sprenger. It is further stipulated and agreed that after said George W. Sprenger was examined on cross-examination, he would testify as follows: That at a meeting of the Grievance Committee of the Peoria Bar Association held June 12, 1939, in which George W. Sprenger was respondent, the following question was asked of him by John Elliott, the Chairman of the committee, 'and you delivered the note and trust deed to the Monarch Finance Corporation?' To which George W. Sprenger answered, 'I delivered the trust deed, but I don't recall about the note.'

We agree with the appellant that this was not an admission of the truth of what Sprenger would have testified to if called as a witness. Whether it was true or not, was to be considered the same as any other testimony, but it stands as evidence in the case. George W. Sprenger says that he never possessed the note, nor sold it to the corporation. There is not sufficient testimony to support the defendant's contention that they did purchase it from Mr. Sprenger for a valuable consideration. We think the evidence clearly sustains the findings of the chancellor.

We find no merit in the contention of the appellant that the case should be reversed and remanded to the trial court to allow defendant's additional attorney's fees. The defendant was tendered the full amount, as found to be due by the chancellor, and the same was paid into the Clerk of the Court for its benefit, and it is there now in full satisfaction of what was found to be due.

The judgment of the trial court is hereby affirmed.

Judgment Affirmed.

Agenda No. 11

328 I.A. 362²

February Term, A.D. 1944

Appellee,

v.

APPEAL FROM THE
CIRCUIT COURT OF
ROCK ISLAND COUNTY.

Appellants

1253

The principal claim of appellee is that the train was being operated at an excessive and negligent rate of speed over

44

Gen. No. 2934

FILE NO. 11

IN THE

SUPREME COURT OF ILLINOIS

FILE NO. 2934

85172

February 1, 1934

John G. McKim,

Appellee,

v.

Joseph B. Fleming and
Aaron Colton, Trustees of
the Estate of the Chicago,
Rock Island and Pacific
Railway Company, a
corporation,

Appellants.

Docket No. 2934

This case is before us for the first time in an appeal by the trustees of the estate of the Chicago, Rock Island and Pacific Railway Company, from a judgment rendered by the circuit court of Cook County, for damages on account of personal injuries to appellee when an east bound passenger train of appellee struck appellee's automobile as he was driving south on Fifteenth Street in the city of Chicago across appellee's tracks. On each of the former appeals no reversal of judgment for appellee because we felt that the verdict of the jury was contrary to the manifest weight of the evidence. The first judgment was for \$7500, the second was for \$15,000, and the third judgment, for \$15,000, after a remittitur of \$2000 from a verdict for \$17,000, is the subject of this appeal.

The principal claim of appellee is that the train was being operated at an excessive and negligent rate of speed over

the Fifteenth Street crossing, considering its nature and location, which is bordered on the south by the business district of the city and on the north by the industrial district. The principal defense of appellants is that appellee was guilty of contributory negligence, and the testimony on these issues in the third trial, as it was on the two former trials, is directly in conflict, so as to require submitting the cause to a jury. The testimony was by the same witnesses in all three trials, except that on the third trial there was one more witness for appellee and one less witness for appellants. The facts in detail sufficiently appear in the two former opinions of this court (Chucklin v. Lowden, et al., 309 Ill. App. 24; 317 ~~Ill.~~ *App.* 537, ~~531~~,) and need not be repeated here.

The grounds urged for reversal on this appeal are that the verdict is contrary to the manifest weight of the evidence, that the verdict is excessive, and that the trial court erred in refusing to give instructions offered by appellants. Of the thirty-two instructions offered by them, the court gave twenty-two, and refused the other ten, and gave nine of the thirteen instructions offered by appellee. No complaint is made of any of the instructions given at appellee's instance. Appellants' refused instruction No. 6 was so long and involved that it could only have confused the jury. The 4th refused instruction in effect directs a verdict and told the jury that unless it appeared from the evidence that the Commerce Commission of this State had by its regulations ordered the maintaining of automatic signal devices at the Fifteenth Street crossing, and that such regulations or orders were being violated at the time of the collision, appellee was not entitled to recover because of the

[illegible]

absence of such automatic signal devices. This instruction ignores the issue of excessive and negligent speed of appellants' train, considering the location and nature of the crossing, and under the doctrine of the common law duty of a railroad company to exercise care and caution at such places, as laid down in *Wagner v. Toledo, Peoria and Western Railroad Co.*, 352 Ill. 85, the instruction was properly refused. The practice of giving an unnecessarily large number of instructions has been repeatedly condemned by the Supreme Court and the Appellate Courts of this State. (*City of Salem v. Webster*, 192 Ill. 369, 374; *Canon v. Grigsby*, 116 Ill. 151, 158).

~~*Wagner v. Toledo, Peoria and Western Railroad Co.*, 352 Ill. App. 348; *Sielly and Chemical Corporation v. Lewis*, 317 Ill. 651.~~ The given instructions covered the issues and fairly informed the jury of the applicable law.

Considering the nature and extent of appellee's injuries, his suffering, the permanent nature of some of the resulting disabilities, his reduced earning power, and his expenses in having his injuries treated, we are unable to say that the judgment is excessive.

The courts have long followed the rule that where three juries have passed on a case and have found the same way, an appellate court will not disturb the verdict, in the absence of prejudicial error, (*Toledo, St. Louis and Western Railroad Co. v. East St. Louis and Suburban Railway Co.*, 206 Ill. App. 216; *Scott v. Parlin and Orendorff Co.*, 146 Ill. App. 92) or reverse the judgment on the ground that the verdict was not supported by the evidence. (*Martin v. Duncan*, 79 Ill. App. 527.)

The most recent expression of a court to the above effect is found in *Campbell v. Chicago, Burlington and Quincy Railroad Co.*, 319 Ill. App. 453, where the circumstances are exactly the same as in this case, and the judgment for the

appellee in that case was affirmed. In our opinion that case covers the situation here. The science of jurisprudence does not contemplate that one litigant may succeed by wearing his opponent out, but, as the courts have often said, litigation in a particular case must end some time. In this case, as was mentioned in the Campbell case, thirty-six jurors and three judges at nisi prius, who saw and heard the witnesses, have decided that appellee is entitled to recover a judgment against appellants. If we should reverse it and remand the cause for another trial, it is improbable that a different verdict would be returned by a fourth jury. The judgment is affirmed.

Judgment affirmed.

appeals in that case was affirmed. In one of the appeals
covering the situation here. In one of the appeals
not concerned with the situation here. In one of the appeals
opponent out, but, in the case of the situation
in a particular case. In one of the appeals
was mentioned in the situation here. In one of the appeals
three judges of the situation here. In one of the appeals
have decided that the situation here. In one of the appeals
against the situation here. In one of the appeals
cause for another case. In one of the appeals
verdict would be the situation here. In one of the appeals
is affirmed.

Reversed and remanded.

57C
1215
Abstract

323 I.A. 363¹

Gen. No. 9917.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
OCTOBER TERM, A. D. 1943
SECOND DISTRICT

MARY WEINBERG, et al,
Plaintiffs and Appellees,)
Vs.)
EDWIN M. JENKINS, et al.,)
Plaintiffs and Appellees.)
DONALD C. ALLENSWORTH,)
Defendant and Appellant.)

1263
A
CHANCERY CASE
No. 12140

Per Curiam

Mary Weinberg et al., started a suit in the Circuit Court of Knox County, Illinois, against Edwin M. Jenkins, et al., to partition certain real estate situated in Galesburg, Illinois. The appellant, Donald C. Allensworth, was also made a party defendant, because he filed a claim for a Mechanics' Lien against said premises, also claimed a right to have a deed executed to him pursuant to a certain contract that he had heretofore entered into between himself and Mary Hoopes Dacken and her husband and Bertha Hoopes Jenkins and her husband, whereby they agreed under certain conditions, to convey to said Donald C. Allensworth an undivided one-half interest in said premises. It is

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alleged in the bill that this contract was entered into between the parties, but that the said Allensworth had wholly failed to comply with his part of the contract, and therefore the agreement is null and void.

The defendant, Allensworth, filed his answer, which is very voluminous and contains much immaterial and irrelevant matter, which has nothing to do with the merits of the controversy. He, acting as his own counsel in the trial court, was evidently given a wide latitude in regard to his pleadings in the case. He admitted that the ownership of the property was properly set forth, but claimed that the contract for his deed of purchase from certain heirs was a valid and existing contract, and that he was entitled to have a Mechanics' Lien on the whole of the property for work and labor which he had performed upon the premises.

It is alleged that A. L. Weinberg now deceased, and Donald C. Allensworth entered into a contract whereby Allensworth was to make certain improvements on the property, which is known as the Plaza Theatre Building. It is also alleged that Weinberg advanced more than \$15,000.00 to Allensworth to make these improvements. It is charged that Allensworth defrauded and took advantage of Weinberg on account of his relationship to Weinberg and that Weinberg was an old man and easily influenced. Allensworth, in his answer, admits that Weinberg advanced \$10,000.00 or more to him for this improvement, but denied that he took advantage of Weinberg in any respect whatsoever.

3.

Mrs. Dacken and Mrs. Jenkins each filed their answer and admitted that they entered into a contract, as set forth in the bill and answer of Allensworth, but charge that Allensworth had wholly defaulted in his part of the contract, and therefore the contract is null and void. The case was referred to the Master in Chancery to hear the evidence and make report of findings of fact and of law. The record consists of 861 pages and contains a great deal of evidence that seems to be immaterial to the issues in this case. The Master filed his report and recommended a decree in favor of the plaintiffs, and found that the contract of purchase between Allensworth, Mrs. Dacken and Mrs. Jenkins be held for naught and that Allensworth was not entitled to a Mechanics' Lien on any part of the premises.

The appellant, Allensworth, has made charges against the trial judges, lawyers, bankers, reporters and others as entering into a conspiracy to defraud him of his legal right to these premises. We find nothing in this record that would justify such a conclusion, but it seems that the master and the judges must have exercised a great deal of fortitude and patience in the trial of this suit, and given the appellant every reasonable opportunity to present his side of the litigation.

The defendant-appellant is acting as his own counsel in this appeal. This Court has been extremely lenient in

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allowing the appeal, as we have given him every opportunity we could, to bring his case for a review to this tribunal. In several respects, the defendant has failed to comply with the rules of this Court and if he had been represented by an attorney, he would have been held to a more strict account than we are inclined to do in this appeal. In the first place the abstract of the defendant is wholly insufficient in that it does not at all comply with our rules pertaining to abstracts, but is a partial index of the first 786 pages of the record. The bill of complaint, the claim for a Mechanics' Lien, and the answers of the defendant are not abstracted at all. In order to get an intelligent idea of what are the real issues in the case, it is necessary to go to the record to find them. There is no brief filed, or points relied upon for a reversal, so that we find nothing presented to this Court, except purely questions of fact, as to whether the trial court, under the circumstances, rendered a proper decree in the case.

The Master in Chancery in his conclusions, finds that the plaintiffs are entitled to the relief, as prayed in their complaint, and there finds, "that in the agreement for deed between Mary Hoopes Schaefer Dacken and Bertha Hoopes Jenkins and their husbands, of the first part, and Donald C. Allensworth, of the second part, it was agreed that first parties should convey a one-half interest in said premises upon payment by him of Seven Thousand Five Hundred Dollars, on or before March 1,

5.

1939, either in cash or by mortgage on all interests in the premises. First parties paid taxes, permitted second party to go into possession, executed and deposited a deed in escrow and thus fully performed their duties under the agreement; that second party did not make payment, by cash or mortgage or otherwise, on or before March 1, 1939, or at any other time, but instead has made complete default. In the agreement it was expressly provided that first parties should not be liable for any expense incurred through second party's operations in altering, remodelling, repairing or rebuilding. The agreement is not an agreement upon which a claim for mechanics' lien may be based. Furthermore, the claim filed by second party on May 28, 1942, was filed long after the commencement of this suit, and long after second party filed answer, and he offered no proof or evidence whatever in support of his claim. An individual who buys real estate on contract makes repairs at his own risk and expense and then makes default in the terms of the contract, cannot maintain a claim for mechanics' lien for the cost of such repairs. The only proof of the value of Allensworth's operations is that such operations did not increase the market value of the premises. His inability to pay cannot be construed as excusable or unavoidable delay under the terms of the agreement. The court should find and order that Allensworth has made a complete

1929, either in case of any change in his position as an
 employee. First, the fact that the company was not
 to be in the possession, and the fact that the company
 and that the company was not in the possession of the
 first second party did not mean that the company was
 or otherwise, on or before March 1, 1929, that the
 first, but instead was some company's property. In the agree-
 ment it was expressly provided that the first party would not
 be liable for any damages incurred by the company in the
 operation of the first party's property, and the company
 The agreement is not an agreement to transfer a claim for
 recovery of the first party's property. The agreement is
 by second party on the 1st day of March, 1929, and the first
 commencement of this suit, and long after second party had
 master, and he offered to give an affidavit to the effect
 of his claim. An affidavit was also made by the first party
 which recites that his own firm had taken and was taking
 part in the lease of the property, and that the first party
 but nevertheless, for the sake of the first party. The only
 proof of the value of the first party's property is the
 operations did not increase the value of the property.
 His liability to pay damages is based on the fact that the
 avoidable delay under the terms of the agreement. The only
 should first and other than the first party's property.

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default in the performance of his covenants in the agreement for deed and that the agreement is now null and void and of no force or effect, and that first parties are released from duty and liability thereunder; and the Court should find and order that Allensworth's claim for lien against the Dackens and the Jenkinses, and against their interests in the premises, is of no force or effect and is not a lien on the premises and that the same be removed as a cloud upon the title; and should further order that the deed, delivered in escrow as aforesaid, be cancelled and held for naught."

The master further found, "that Abraham L. Weinberg owned one-half of the premises and Allensworth had contracted to purchase the other one-half from the owners thereof. They entered into a joint business venture for the improvement of the premises, hoping ultimately to make a profit. To this venture Allensworth contributed time, labor and some money, while Weinberg contributed a much larger amount of money. The excess of money advanced by Weinberg was even much greater than Allensworth's unexplained, unitemized and unproved claim of Five Thousand Dollars for "labor, management, control and design." The venture proved disastrous, and the only proof herein of the value of the proposed improvement is that, after the use of the time, the doing of the labor and the expenditure of the money contributed, the market value of the premises was less when the work of improvement was discontinued than when

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it was begun. After its discontinuance, Allensworth filed a claim on September 20, 1940, for mechanics' lien against the Weinberg interest in the sum of Ten Thousand Six Hundred Seventy-One and 33-100 Dollars. The best proof herein is that Weinberg had advanced over Fourteen Thousand Dollars, and there is no proof that he had misled or deceived Allensworth or had failed to observe any promise made by him to Allensworth. Even if Allensworth had owned in fee half of the premises, while Weinberg owned the other half, and if they had entered upon an extensive and expensive plan of rebuilding, which resulted in loss to both, then Allensworth could no more have maintained a claim for mechanics' lien against Weinberg than Weinberg could have maintained such a claim against Allensworth, nor does the fact that one of them only expected later to become a full half-owner add to or lessen the right of either to mechanics' lien. The contract relied upon by Allensworth is not sufficient basis to support a claim for lien. There is no proof that Weinberg ever agreed, expressly or impliedly, to pay anything to Allensworth. They entered jointly into the enterprise and both lost, Weinberg losing far more than Allensworth. The Court should find and order that the claim for mechanics' lien filed by Allensworth on September 20, 1940, against the Weinberg interest, is of no force or effect, and that Allensworth has no lien on such interest and that the claim for lien be removed as a cloud on title."

8.

The appellant contends that the master's report of testimony is incorrect in many respects, but the record has been certified to us as being correct, and this Court will so consider it, until it is challenged in a legal manner. From an examination of the record in this case it is our conclusion that the master's summary of the evidence is sustained by the record. The Court, in its decree, made specific findings of fact in conformity with the master's report, each of which, we think, is sustained by the evidence in the case.

The decree of the Circuit Court of Knox County is hereby affirmed.

Affirmed.

The present document is a preliminary report of the results of the investigation conducted by the Commission on the subject of the alleged activities of the "Black Legion" in the United States. The Commission was organized by the Department of Justice in 1936, and its purpose was to determine the extent of the activities of the "Black Legion" and to recommend measures for its suppression. The Commission has held numerous public hearings and has received many suggestions from the public. It has also conducted extensive research into the activities of the "Black Legion" and has gathered a large amount of evidence. The results of this investigation are set forth in this report. It is the opinion of the Commission that the "Black Legion" is a real and dangerous organization, and that it is necessary to take prompt action to suppress it. The Commission recommends that the Department of Justice should continue its efforts to suppress the "Black Legion" and that it should take such steps as may be necessary to protect the public from its activities.

Very truly,
[Signature]

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1944

Term No. 44F8

Agenda No. 6

HARRY C. KINNE, UELLA KINNE,
ELNORA HORTON,

Plaintiffs-Appellants

vs.

DICK DUNCAN, et al.,

Defendants-Appellees.

323 I.A. 888²

Appeal from

Circuit Court

Clinton County

BRISTOW, J.

The sole question for determination in this appeal is whether interest should be allowed from the date of a decree entered July 22, 1941; or from the date of the final decree entered August 27, 1943.

Appellants, plaintiffs below, filed their complaint to remove clouds upon their undivided interest in a certain oil and gas lease, for an accounting against Dick Duncan, Appellee, and for the appointment of a receiver. Duncan filed his cross-complaint claiming a partnership lien as a mining partner with plaintiffs and also claiming a statutory oil and gas lien against the interest of plaintiffs. Duncan filed his claim for lien of record and gave notice to Union Pipe Line Company, which was receiving oil from several wells of the mining partnership, and the Union Pipe Line Company stopped payments it had been making. Assignments against oil had been made by the partners to First United Finance Company, which had advanced large sums of money which Duncan, who was an oil driller, used in drilling several wells on the oil lease property of

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this partnership.

Duncan claimed he had incurred certain debts in conducting the copartnership business and that against the interests of plaintiffs, his partners, he should have a lien for \$15,200.83 for this partnership indebtedness. He claimed this amount as a lien superior and prior to any lien and claim of First United Finance Company and asked for foreclosure on his lien. First United Finance Company filed its counter-claim alleging that its rights were superior to both Duncan and plaintiffs.

A decree was entered by the Chancellor on July 22, 1941, for judgment against plaintiffs in favor of Duncan for certain amounts and for interest from the date of the decree. The plaintiffs, who are also appellants here, appealed to this court. Dick Duncan, defendant, also filed his cross-appeal and alleged that he was taking appeal from the entire decree entered by the Chancellor in the Circuit Court. The decree was affirmed in part, reversed in part and remanded with directions, by this court. Its opinion is found in *Kinne vs. Duncan*, 315 Ill. App. 577.

On further appeal by appellants, the cause was reviewed by the Supreme Court. Its decision is found in *Kinne vs. Duncan*, 383 Ill. 110. The Supreme Court affirmed, in most part, the decision of this court. It reversed the decree with respect to certain amounts ordered paid direct to Duncan; but in that particular remanded the cause with directions for the Chancellor to determine and cause payments to be made to the creditors of the partnership because of whose claims Duncan asserted his mining partnership lien.

Duncan owned a one-half undivided interest in this oil and gas lease. Plaintiff and appellant, Elnora Horton, owned

a one-fourth undivided part thereof. Plaintiff and appellant Harry C. Kinne, owned a one-eighth undivided part thereof, and Plaintiff and appellant, Uella Kinne, owned a one-eighth undivided part thereof.

As a result of these appeals, substantial changes were made in the original decree, and in the main were adverse to the contention made by Dick Duncan.

The decree of the Chancellor adjudged a lien against Appellants, Harry C. Kinne and Uella Kinne, jointly as owners of an undivided one-fourth of this lease. This court adjudged that the Chancellor should not have held them each liable for one-fourth of the development cost, but only for one-eighth of such costs.

The decree of the Chancellor fixed the amounts of \$838.78 due Fox, Rigg and Lumber Company, and \$580.00 due Pure Torpedo Company, as entitled to priority payment before payments due said First United Finance Company. This court determined that their rights were inferior and subordinate to the rights or demand of the First United Finance Company and that the amounts due these two creditors should be included with that of other creditors of said copartnership, for which Dick Duncan claimed and was entitled to, a partners lien.

Duncan also claimed that the amount due under his lien from plaintiffs' share of proceeds of oil runs, was superior and prior to the lien and right or demand of the First United Finance Company. This court adjudged that his rights were subordinate to such rights of First United Finance Company. The Chancellor denied that Duncan was entitled to the amount of \$10,800.00 of his claim for partnership lien against the partnership assets. It found that that amount was the amount of profit of Duncan and denied his right to such profit from his copartners,

for labor and material furnished by him in the development of the partnership property. This court confirmed such holding.

This court determined that Duncan was entitled to payment from Appellants of their proportionate share of the amounts found to be due him under his partnership lien. The Supreme Court modified said holding of this court, and to protect plaintiffs, directed that the decree should have provided such money should be disbursed under order of the trial court in discharge of those partnership obligations, incurred by Duncan. The Chancellor's decree gave Duncan a mining partner's lien against the respective interests of plaintiffs in the leasehold estate, the oil produced therefrom and the proceeds thereof. This court adjudged such provision too broad and restricted it to oil entering the pipe-line and proceeds therefrom from the date of the service of notice of the lien of Duncan.

While these appeals were pending, there accumulated in the hands of the receiver \$16,627.60 of undistributed profits of this copartnership. Had the part of plaintiffs in this amount been distributed to First United Finance Company and not been prevented from payment by the claim of Duncan to be superior to that of First United Finance Company, accrual of interest would have been prevented.

It is contended, that, since the decree of July 22, 1941, contained a provision for interest from its date upon amounts therein stated, and since the reversal and remandment orders of the Supreme Court and of this court made no mention regarding interest, that the trial court could not adjudge interest upon amounts found in and from the date of its decree entered upon the remandment order. Appellees cite and rely upon Pritchard, et al. vs. Arthur W. Fruit, et al., 214 Ill. App. 340, Washburn



& Moen Manufacturing Company vs. Chicago Galvanized Wire Fence Company, 119 Ill. 30, Harding vs. Kuessner, 172 Ill. 125, People vs. Chicago Park District, 291 Ill. App. 205, 33 Corpus Juris Par. 160, and 30 Am. Juris. 39.

Appellants admit that the general rule is that a trial court, upon remandment with directions, must follow the directions given. An examination of the cases cited by Appellees will disclose that in those cases the court of review did not make substantial alterations in the judgment or decree of the lower court.

In the Pritchard case, the Appellate Court found the amount due on a certain mortgage to be that found by the trial court.

Upon remandment, the trial court recalculated at a larger rate of interest and changed the amount in its second decree. Such change was not authorized.

In Washburn & Moen Manufacturing Company, the court said the lower court was not authorized to include anything upon remandment with specific directions, which was not actually expressed or necessarily implied in the language of the opinion directing the modification. In the Harding case, a remittitur on a judgment had reduced its amount and interest was allowed upon the reduced amount. The Supreme Court said that whether the amount of interest was excessive was a question of fact which that court did not consider. In People vs. Chicago Park District the amount of the judgment was increased on appeal and judgment was entered in the Appellate Court. Defendant contended that he was not liable for interest from the date of the judgment in the Superior Court. The Appellate Court held that he was liable.

An examination of the foregoing authorities discloses



that the judgment of the lower court was substantially affirmed in the court of review and that no contentions by plaintiffs were raised preventing payment of the amounts rightfully due and payable.

As pointed out in certain particulars above, we are of the opinion that in this case the judgment of the Chancellor was not substantially affirmed by this court and the Supreme Court; but in very material matters was overruled and directed to be changed.

The Cross-complaint and claims set up by Duncan which were adjudged unfounded, and the cross-appeal by him, pressing for review of many of said substantial claims, which were denied upon review; prevented payments, and the distribution of the accumulation of moneys due to the creditors of plaintiffs.

The notice on cross-appeal of Duncan prayed that the decree be reversed, that this court enter a decree directing the Chancellor to enter a decree pursuant to the prayer of Duncan's counter-claim and deny all relief to plaintiffs. These sweeping requests were overruled and denied. The determination of the actual amount of the partnership lien of Duncan was not and could not have been determined until after the remandment of the cause by the Supreme Court, and the names and amounts due all of said creditors of the partnership upon which claim Duncan's lien was based, could be determined by the trial court. That required the taking of evidence

We do not think that it was implied by the opinion of the Supreme Court that interest should not be adjudged to run from the date of the final determination, after remandment, of the various amounts due the various creditors and the total amount of same. By following the directions upon remandment, it is to be noted that the persons to whom the payments were directed to be made were changed, and priorities of demands claimed by



Duncan were denied and the amount to be paid to Duncan himself was almost eliminated by the decision of the Supreme Court as shown by the amount to creditors determined in the final decree of the Chancellor. Said date was August 27, 1943, and the date from which interest should be charged.

The partnership lien is to compel partners to pay their proportionate share of partnership debts. There is no proof in the record, pointed out to us, that any interest was added in the amount found due, and directed to be paid to these partnership creditors. Any balance of the share otherwise due Duncan would be distributable to him. He could not profit by having such balance increased by interest against plaintiffs' share of liability of payment of the partnership creditors, for the same reason he could not charge profits against his partners.

Appellants have cited a number of authorities supporting their contention that interest should be charged from the date of the decree rendered after the cause was remanded. Such authorities relied upon are: Hillmer, et al. vs. Block, et al. 315 Ill. App. 134, McGowan vs. London & Lancashire Ins. Co., 237 Ill. App. 561, 569, 33 Corpus Juris 247, par. 161, Compton vs. Hammond Lumber Co., 61 Pac. (2d) 1257, 1258, State ex rel vs. City of St. Louis, et al. 115 S.W. (2d) 513, 515, 516.

In the full opinion of Hillmer, et al. vs. Block, et al., which is cited in the report as a syllabus opinion, appears a situation very much like the instant case. In the Hillmer case the former litigation involved claims of creditors against stockholders of a bank. In that opinion the court said: "The several amounts found due from them were not determined until the opinion of the Supreme Court was filed and a rehearing denied February 5th, 1941. In these circumstances we think it would be inequitable to require defendants to pay interest from 1938." The date of the decree in the Superior Court was September 17, 1938.



The McGowan case was in regard to a suit against a surety on a bond. The trial court fixed damages at \$1896.00, the Appellate Court at \$550.00, without interest. The court said: "We do not include interest on that amount since the trial, for the fact that the plaintiff has been deprived of the amount of the judgment for the intervening time is no fault of the defendant."

The author in 33 Corpus Juris 247, recited the rule to be that where both parties appeal from a judgment, interest will not be allowed on the judgment because both parties are responsible for the delay in the payment thereof. The same principle was announced in Milliken vs. Haner, 184 Ky. 694, and Compton vs. Hammond Lumber Company, supra. In State, ex rel vs. City of St. Louis, et al., after discussing the general theory of interest as being compensation for improper retaining of the creditors' money, the court pointed out the distinction where the creditor by his own action has delayed payment until the litigation, in part caused by himself, had terminated. The court said: "But where it is the judgment creditor himself who is dissatisfied, and he appeals upon the ground of what he conceives to be the inadequacy of the judgment *** he is held not to be entitled to interest on the judgment pending the disposition of the appeal, since it was by his own act that the proceeding was delayed and prolonged *** the correctness of the judgment finally culminated in its affirmance by the Appellate Court *** When it is the judgment creditor himself who creates the situation whereby the judgment may not be satisfied and the judgment debtor discharged, he is in no position to insist that there is money due upon the judgment, and until money is due upon the judgment, there is no authority for exacting interest upon the theory of a default in satisfaction of it."



We believe these decisions are sound and recite rules that are applicable to this case. The claims made by Duncan which were later determined to be unfounded, fully justified appeal by plaintiffs. The claims by Duncan in his counter-claim and cross-appeal likewise prevented payment by plaintiffs or from funds in the hands of the receiver. Duncan was in the same position as had he directly taken the appeal. It would be inequitable to assess interest from the date of the first decree which was erroneous in so many important particulars. Interest should begin to run from the date of the decree rendered after the remandment.

This cause should be and accordingly is reversed and remanded with directions that the Chancellor alter the decree as to the date when interest shall begin to accrue, as being the date of the decree rendered by the Chancellor after said cause was remanded to him by said judgment of the Supreme Court.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

FILED

MAY 26 1944

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1944.

323 I.A. 364

Term No. 42036

Agenda No. 12.

JOHN BROWN, THOMAS CORRIE,
MATTIE HUNLEY, MARY ADA
PECK, DORA PETERS, ALVIN
F. PINKSTAFF, MARY SCAGGS,
DORA SHUTE, ALEXANDER
STOLTZ, HARRY T. WALDROP,
and JESSE WARREN, all De-
ceased, by his or her
personal representative.

Plaintiffs-Appellants,

vs.

THE COUNTY OF LAWRENCE,

Defendant-Appellee.

Appeal from the

Circuit Court of

Lawrence County.

BRISTOW, J.

This is an appeal from the Circuit Court of Lawrence County, wherein a large number of plaintiffs by their personal representatives have sued the County of Lawrence to collect varied amounts due them as blind pensioners. All of the plaintiffs were regularly and duly upon the Blind Relief rolls and were entitled to monthly payments from the County of Lawrence as a result thereof. Suit was instituted by a number of blind pensioners, some of whom were still living and others had become deceased. Judgment was entered in the Court below for those who were still alive and judgment was denied those who had become deceased. This latter class has appealed to this Court, asking that said judgment be reversed on the theory that the claims of that class survive and that the right to collect the same vested in their respective representatives.



Recently, this identical question was passed upon by our Supreme Court in the case of Creighton, et al., etc. vs. County of Pope, 386 Ill. 468, which held that the unpaid installments of blind relief benefits accruing before the death of a beneficiary do not survive or pass to his personal representative.

In view of the above opinion, this court has constrained to hold that the Circuit Court was correct in entering judgment for the County of Lawrence and against each plaintiff in bar of action and costs.

JUDGMENT AFFIRMED.

Abstract

FILED

JUN 1 1944

David J. Mallett

323 20. app
Case No 4
7-25-44

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1944

323 I.A. 36

Term No.43022

Agenda 24

ARLIE WOLFINBARGER, OTTO HICKS,
E. H. BURRESS, CLEVE RICH and
B. H. CARTER,

Petitioners and
Appellees

vs.

THE COUNTY COURT OF WILLIAMSON
COUNTY, ILLINOIS, and S. E. STORME,
COUNTY CLERK OF THE COUNTY COURT
OF WILLIAMSON COUNTY, ILLINOIS

Respondents,

THE COUNTY COURT OF WILLIAMSON
COUNTY, ILLINOIS, FRANK LEDBETTER,
FRED PETERSON, WOODROW W. CHILDERS,
JOSEPH TWEDDLE and ELDON COX,

Appellants.

Appeal from the

Circuit Court of

Williamson County

STONE, J.

This is an appeal prosecuted by the County Court of William-
son County, respondent, and the intervenors hereinafter named, |
from a judgment entered in the Circuit Court of Williamson County,
in a common law certiorari proceeding. The certiorari proceeding
was instituted to attack a judgment of dismissal entered in the
County Court of Williamson County, in a proceeding to contest a
local option referendum held in the City of Carterville.

The petition for the writ of certiorari was filed by Arlie
Wolfinbarger, Otto Hicks, E. H. Burgess, Cleve Rich and B. H.
Carter. Respondents named in the petition were the County Court
of Williamson County, and S. E. Storme, Clerk of the County Court
of Williamson County.

In response to the writ, there was filed in the Circuit



Court a transcript of the proceedings had in the County Court. The hearing in the Circuit Court was had on the allegations of the certiorari petition, a motion to quash the writ of certiorari filed by the intervenors and the aforesaid transcript of proceedings in the County court. That record discloses that at a regular election for city officials held in the City of Carterville, on April 20, 1943, there was submitted to the voters the proposition, "Shall the sale at retail of alcoholic liquors be prohibited in this city?" A canvass of the votes cast upon the proposition disclosed that a majority of such votes were in favor of the proposition.

On April 29, 1943, the above named petitioners filed in the County court of Williamson County, a verified petition to contest the said election. With said petition to contest the election there was filed a purported bond for costs, which instrument was signed by the five petitioners and by no other persons.

On May 12, 1943, Frank Ledbetter, Fred Peterson, Woodrow W. Childers, Joseph Tweddle and Eldon Cox, legal voters of the City of Carterville, were granted leave to intervene in defense of the validity of said election. Said interveners then filed a motion to dismiss the petition to contest the election, alleging among other grounds therefor, that the purported bond for costs had no sureties thereon that it did not meet the requirements of the statute and because of such defect the court had no jurisdiction to entertain the contest proceedings.

Upon a hearing the County Court entered an order, finding that no bond for costs within the meaning of the statute had been filed, and that the court had therefore never acquired jurisdiction, and dismissed the petition to contest the election.

Thereafter the same five individuals who had filed the contest petition in the County Court, filed the petition for writ of

certiorari involved in this appeal. That petition alleged that the order of the County Court was erroneous and wrong, and that said County Court in rendering said order proceeded illegally and did not correctly apply the law to the question raised by the pleadings as to the bond for costs. A motion to quash the writ of certiorari was filed by the five intervenors and upon hearing this motion, the Circuit court entered an order overruling the motion to quash the writ, and ordering that portion of the record of the County Court in which said court held that it did not have jurisdiction of said cause for want of a sufficient bond for costs, be quashed. Said order further remanded the cause to the County Court with orders to proceed therein as provided by law.

It is alleged as error, that the trial court erred in ordering that the portion of the record of the County Court, in which said court held it did not have jurisdiction of said cause for want of a sufficient bond for costs, be quashed, that the court further erred in entering the order remanding said cause to the County Court, with orders to proceed therein, and in addition thereto, that the court erred in treating said certiorari proceeding as an appeal proceeding.

The common law writ of certiorari may issue to all inferior tribunals and jurisdictions, in cases where they exceed their jurisdiction, and in cases where they proceed illegally, and there is no appeal or other mode of directly reviewing their proceeding. *Doolittle vs. Galena and Chicago Union Railroad Company* 14, Ill. 380. The issue under this proceeding is not whether the inferior court committed error, but whether it had jurisdiction to do the act or enter the order complained of. *People ex rel Meier vs. Jenner* 214 Ill. App. 321; *Scates vs. Chicago & Northwestern Railway Co.* 104 Ill. 93; *Doolittle vs. Chicago Union Railroad Company*, *supra*, *Baetunek vs. Lastovken*,

350 Ill. 380; Heppe vs. Mooberry, 350 Ill. 641.

The office of the writ, is not to use it as a complete substitute for a writ of error or an appeal, but only to bring before the court awarding it, the record of the proceeding of the inferior tribunal, and the judgment must either be that the writ be quashed and a procedendo awarded, or that the record of the proceedings be quashed. Chicago and Rock Island Railroad Co. vs. Fell, 22 Ill. 333; Com'rs of Sonora vs. Supervisors of Carthage, 27 id. 140. The court awarding the writ cannot remand the cause to the inferior tribunal for the further proceeding, as such action would be that of an appellate tribunal reviewing the action of such inferior court. People vs. Fisher, 373 Ill. 228. The Circuit Court of Williamson County erred in quashing a portion of the record of the County Court of Williamson County and remanding the cause to that court with orders to proceed therein as provided by law.

In alleging, in the petition for the writ of certiorari, that the order of the County Court was erroneous and wrong, and that said court in rendering said order proceeded illegally, and did not correctly apply the law to the question raised by the pleadings as to the bond for costs, the petitioners thereto evidently proceeded on the assumption that such writ of certiorari may be used as a substitute for a writ of error or appeal. While a court on certiorari may inquire whether the inferior court proceeded legally, such inquiry is limited to a determination of whether the form of proceeding legally applicable to the case was followed, and the superior court may not determine the correctness of rulings of the inferior court on the law, or on its application to the facts. Hamilton vs. Harwood, 113 Ill. 154; Scates vs. Chicago and Northwestern Ry Co. supra, In the case of Hamilton vs. Harwood, supra, the Supreme Court said;

"The rulings of the Court upon the law and the evidence in the progress of the trial, and in the application of the law to the facts in the rendition of judgment, cannot be reviewed in this manner. We can only inquire, when a return is made to the writ bringing the record before us, whether the inferior court had jurisdiction and proceeded legally, - i. e. followed the form of proceeding legally applicable in such cases - and not whether it correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial before the court and jury, and in the overruling of motions for new trials and in arrest of judgment, and the rendition of judgment after verdict, etc. The rulings of a court may be erroneous, and yet it may have jurisdiction and proceed legally."

In the instant case, in the county court, the "form of proceedings legally applicable in such cases" was followed. There a motion to dismiss the contest petition was filed, wherein the grounds of the motion were specifically set forth. Then, in the exercise of its inherent jurisdiction to dispose of proceedings filed therein, it allowed the motion. In the exercise of its power, the County Court may have committed error. That is not for this court to pass upon. Nor was it the province of the Circuit Court to pass upon that question, for the certiorari proceeding did not involve the question of whether error was committed, but only the question as to whether or not the court had the power or jurisdiction to enter the order. It is the judgment

of this court, that the Circuit Court of Williamson County erred in treating the certiorari proceeding as a proceeding in which it could correct alleged errors of law committed by the County Court, and the judgment of the lower court will be reversed and remanded, with directions to quash the writ.

REVERSED AND REMANDED WITH
DIRECTIONS.

Abstract

FILED

JUN 13 1944

David J. Mallett

CLERK OF THE APPellate COURT
FOURTH DISTRICT

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LEYDEN PREMIER CAB COMPANY,
a corporation,

Appellee,

v.

CITIZENS CASUALTY COMPANY OF
NEW YORK, a corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

51

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment entered in favor of plaintiff for \$3,281.98, upon the pleadings, affidavits and counteraffidavits presented.

It appears from the pleadings that Leyden Premier Cab Company was engaged in operating taxicabs at Franklin Park, Illinois, and in surrounding territories. Defendant, Citizens Casualty Company of New York, is a New York corporation authorized to do business in this state and to issue policies of insurance within the provisions of sections 42a, 42b, 42c and 42d of the Motor Vehicle Law of Illinois (Ill. Rev. Stat. 1939, ch. 95-1/2, pars. 59-62), for the purpose of protecting its assureds from liability for injuries and death, and of paying and satisfying all final judgments subject to the company's limit of liability as set forth in its respective policies. March 20, 1939 it issued to plaintiff its motor vehicle indemnity policy insuring a 1937 Chevrolet sedan. Plaintiff paid the premium, and all conditions precedent, terms and provisions of the policy were fully complied with. May 26, 1939, while the policy was in full force and effect, an automobile accident occurred in which the taxicab described in the policy was involved. Charles Linkenheld received personal injuries as a result of the accident, from which he died. Thereafter his widow, as administratrix, instituted suit against Herbert Miller and Leyden Premier Cab Company, which

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Only one was involved, Charles L. Smith, a resident of

then conducted, it was decided to make the following:

was reached for trial in February 1941. Defendant assumed the defense of the litigation. The verified complaint alleges that during the course of the trial plaintiff therein agreed to compromise the liability for the sum of \$1,000 but that the offer was rejected by the insurance company, and subsequently on February 14 a judgment was rendered in the case against Miller and the cab company for \$7,500 and costs. The insurance company took an appeal from the judgment in the name of Leyden Premier Cab Company but failed to file a supersedeas bond to stay the execution and thereby protect plaintiff in this cause during the pendency of the appeal. It is alleged that in August 1941 the administratrix, by letter, agreed to release plaintiff from further liability on the judgment upon immediate payment of the sum of \$2,500, and shortly thereafter plaintiff made demand on the insurance company to pay that sum to protect plaintiff from further liability, but the insurance company declined so to do, even though warned that the attorneys for the administratrix threatened to levy on and sell plaintiff's assets and thus prevent it from carrying on its business. After the judgment was rendered the administratrix caused execution to issue thereon and threatened to levy on plaintiff's assets. The cab company was therefore forced to pay the sum of \$2,806.40 (\$2,500 plus interest and court costs) to compromise its liability so as to prevent a levy on its property and avoid a revocation of the licenses of its taxicabs, as provided in the 1941 Illinois Revised Statutes, section 42--3 (par. 58c) of chapter 95-1/2. The complaint alleges that by reason of the wrongful refusal of defendant to pay or compromise the judgment for the sum of \$2,500, which was the limit of liability, or less, and its failure and refusal to file a supersedeas bond pending the appeal, plaintiff, in order to protect its assets against levy and to prevent the revocation of its licenses, was compelled

to and did pay the sum of \$2,806.40, in addition to \$308.20 for attorneys' fees and expenses incurred thereby; that notwithstanding demand made on defendant, it has refused to pay the sum incurred in making settlement with the administratrix; that because defendant's refusal was vexatious and without reasonable cause, plaintiff asks the allowance of reasonable attorneys' fees, as provided in chapter 73, article IX, sec. 155 (par. 767), Illinois Revised Statutes 1941, and seeks judgment in the aggregate amount of \$3,114.60, and costs, attorneys' fees and interest from October 10, 1941, when the settlement was made.

Defendant's motion to strike the complaint and dismiss the cause was overruled, and thereupon it filed a verified answer, denying liability, averring that it was at all times ready, able and willing to file a supersedeas bond in the amount of \$2,500 but that plaintiff failed and refused to file a supersedeas bond in the amount of \$5,000 to stay the judgment and thus protect itself and defendant during the pendency of the appeal. The answer averred that pursuant to the terms of the policy no liability was incurred by defendant because no final judgment had been rendered against plaintiff by reason of the pendency of the appeal of the cause to the Appellate court.

Subsequently plaintiff filed its motion for summary judgment, supported by affidavits, to which a copy of the policy in suit, and various letters of correspondence were attached. One of the affidavits was executed by Ralph Gohrsch, Jr., plaintiff's president, alleging in substance the same matters as appear in the complaint, to which was attached a letter dated August 6, 1941, addressed to plaintiff by counsel for the administratrix, offering to accept \$2,500 and stating that on failure to pay, a levy of execution would follow. Another letter addressed to plaintiff threatened a complaint to the secretary of state to

suspend plaintiff's licenses to operate cabs. Another affidavit, signed by Stuart B. Krohn, attorney for the administratrix, alleged that on October 10 the cab company settled the case for \$2,806.40 and that on October 16, as attorney for the administratrix, his motion to dismiss the appeal was allowed. To another affidavit, signed by Owen Rall, there were attached three exhibits, one of which was a letter addressed to the attorney for the insurance company, making a demand on defendant to pay \$2,500 by August 8, 1941 and stating that in the event the payment was not made the cab company would hold defendant for any loss suffered by it on account of its failure so to do, and would file a complaint against the insurance company with the appropriate state officials. Exhibit 2 was a letter dated August 13, 1941, addressed to plaintiff's attorney by Wyatt Jacobs, representing defendant, which stated that the insurance company had fulfilled its contract by appealing in good faith from the judgment rendered and by offering to post a supersedeas bond in the amount of \$2,500. Exhibit 3 was a letter addressed to defendant by plaintiff's attorneys, informing it of the payment of \$2,806.40 and demanding that sum, plus \$308.20 for attorneys' fees and expenses.

Defendant filed a motion to strike the motion for summary judgment, which was subsequently overruled by the court, and thereupon it filed its counteraffidavit, sworn to by Wyatt Jacobs, attorney, alleging that he had caused the depositions of Alvin Kvistad, Earl Garrett and Stuart B. Krohn to be taken and attached thereto; that the alleged payment of the judgment was made by a check for \$500 and a judgment note in the sum of \$2,306.40, payable in 90 days; that the note was twice extended for periods of six months and to date had not been paid; that no accounting was made to the Probate court by the administratrix, nor had she received the approval of the Probate court to

accept the payments as alledgedly made; that plaintiff's minute books contained no minutes authorizing plaintiff's president to issue its promissory note; that the law firm of Krohn and MacDonald had not received any attorneys' fees for the portion of the judgment allegedly paid by the judgment note; that the insurance company believed it had a good and meritorious defense to the case of the administratrix against Miller and the Leyden Premier Cab Company, and that an appeal had been taken from the adverse judgment of the trial court; that the brief and abstract on behalf of the cab company were due October 7, 1941 and duly filed; that the alleged agreement between the cab company and the administratrix was consummated on October 10, 1941, and the following day the affidavit of the firm of Krohn and MacDonald was filed to dismiss the appeal because of the satisfaction of judgment; that the judgment in the amount of \$7,500 was rendered on February 14, 1941 against Miller and the cab company, and even though Miller was insured by a \$10,000-\$20,000 liability policy, action had not been taken against him although no appeal or stay of judgment had been prosecuted prior to October 10, 1941; that one of the attorneys for the administratrix was Alvin Kvistad, who was personally acquainted with the officers of the cab company, and prior to the accident on May 26, 1939 represented the cab company in several legal matters; that affiant had been diligently attempting to take the deposition of the administratrix for the purpose of inquiring into the alleged payment of the judgment and that she knowingly resisted the service of a subpoena therein; that the alleged payment of the judgment was not made in good faith but was voluntarily made for the purpose of causing the appeal filed on behalf of the cab company to be dismissed and as a pretext for forcing the defendant to pay the judgment; that although defendant denied that the judgment had been paid, it verily believes the alleged note was given, not

in good faith, but in an attempt to defraud the defendant; that there was no final judgment up to the time payment was made and that no action can be brought under the policy because it provides that only the owner of the judgment can take action.

Plaintiff then filed the further affidavit of Ralph Gohrsch, Jr., and Earl Garrett, as president and secretary-treasurer, respectively, of the plaintiff company. Their affidavit alleged in substance that plaintiff is a closed corporation, that during the course of the years more than 50 notes have been executed by its officers without any minutes ever having been made authorizing the execution of such notes, although authority was given by the board of directors and shareholders so to do; that the minutes of only three of the meetings had been reduced to writing; that during negotiations with the administratrix they had been informed that the judgment could be satisfied by payment of \$500 cash and a note for \$2,306.40; that a special meeting was called, attended by all the directors and shareholders of the cab company, the settlement approved, and the president authorized to execute the judgment note; that no written minutes of the meeting were kept; that the note and check were delivered; that Stuart Krohn stated he would execute a satisfaction of judgment; that the note is the absolute obligation of the plaintiff and not subject to any conditions; that subsequently plaintiff received notice from the secretary of state that its license was suspended on account of the existence of the judgment.

Stuart B. Krohn's affidavit further stated that he personally knew that the administratrix had on about October 10, 1941 accepted the sum of \$7,806.40 in full payment of the judgment rendered and that she did so with the consent of the two children who survived the decedent as his next of kin; that the judgment was paid as follows: \$5,000 in cash by Miller, \$500

in cash by the cab company, \$2,306.40 by a judgment note of the cab company due and payable 90 days after date of issue, with interest at 5 per cent per annum.

Defendant then filed the counteraffidavit of Wyatt Jacobs, its counsel, alleging that the sum of \$300 is not a fair and reasonable charge as fees for services rendered by plaintiff's attorneys from August 4, 1941 to October 10, 1941, and that the sum of \$300 represents fees charged for services rendered prior to August 1941, as well as for services rendered subsequent thereto.

It is the settled rule in this state that if there is a material issue of fact it must be submitted to a jury. Gliwa v. Washington Polish Loan and Building Association, 310 Ill. App. 465; Soelke v. Chicago Business Men's Racing Association, 314 Ill. App. 336. The only questions of fact which defendant claims were put in issue by the pleadings and affidavits presented, were the payment of \$2,806.40 to the administratrix and the reasonableness of \$300 allowed as attorney's fees. Defendant's counteraffidavits averred in general terms that the payment of \$2,806.40 by the cab company was "an attempt to defraud the defendant," but it took depositions which showed the details of such payment, without indicating any irregularity, except by intimation on the part of the defendant that the payment was not made in good faith and that it was voluntarily made for the purpose of causing the appeal to be dismissed and as a pretext for compelling defendant to pay the judgment. The depositions taken by defendant showed that the cab company gave the administratrix a check for \$500 and a note for the balance. Defendant admits the demand on it as early as August 8, 1941 to pay on the \$7,500 judgment the sum of \$2,500, which the judgment creditor was willing to accept in full payment of the cab company's liability. Wyatt Jacobs' affidavit and the attached

In each of the two cases, the court found that the defendant was liable for the damages caused by the fire, and that the plaintiff was entitled to recover the amount of the damages.

The court also found that the defendant was liable for the damages caused by the fire, and that the plaintiff was entitled to recover the amount of the damages. The court also found that the defendant was liable for the damages caused by the fire, and that the plaintiff was entitled to recover the amount of the damages.

It is the duty of the court to determine the facts of the case, and to apply the law to those facts. The court found that the defendant was liable for the damages caused by the fire, and that the plaintiff was entitled to recover the amount of the damages. The court also found that the defendant was liable for the damages caused by the fire, and that the plaintiff was entitled to recover the amount of the damages.

depositions prove that the payment was made October 10, 1941, and the delay in payment accounts for the fact that it amounted to \$2,806.40, instead of the \$2,500 which the administratrix had previously been willing to accept. Evidence of fraud and collusion would not have been admissible on trial if the cause had been submitted to the jury, without specific facts to support the charges, and no such specific facts are alleged in any of defendant's affidavits. Defendant's answer interposed a very narrow defense; it merely denied liability, averred that it was at all times ready, able and willing to file a supersedeas bond in the amount of \$2,500, without alleging that it had ever offered to do so, and averred that pursuant to the terms of the policy, no liability was incurred by defendant because no final judgment had been rendered against plaintiff by reason of the pendency of the appeal in the Appellate court. Under the settled rule, none of these averments and none of the affidavits supporting the answer raised any triable issue of fact.

Considerable discussion arises as to the supersedeas bond. Plaintiff alleged that defendant had failed to stay the proceedings by filing such a bond. Defendant's answer did not deny that allegation but merely averred that it was "ready, able and willing to file a supersedeas bond in the amount of \$2,500." The fact remains that it did not file a bond or attempt to stay the judgment by obtaining a supersedeas. This left plaintiff in jeopardy of a threatened levy on its taxicabs, which would have made it impossible for it to continue in business. Plaintiff's affidavits specifically alleged that such a levy was threatened by the administratrix unless payment was made, and that a complaint would be lodged with the secretary of state to revoke its licenses. In that situation plaintiff had no alternative except to pay the administratrix; it could not abide the determination of the appeal, unless it was superseded, without irreparable loss.

The insurance company claims that it was not obligated to put up a supersedeas bond, but neither was plaintiff obliged to allow its cabs to be sold on execution when payment of the insurance company's primary liability of \$2,500 would have settled the entire judgment of \$7,500. A similar question arose in Roth v. General Casualty & Surety Co. (New Jersey, 1929), 146 Atl. 202, wherein the court held that defendant was liable notwithstanding the settlement of the judgment by plaintiff, and made the following observation: "The judgments procured against him amounted to five and one-half times the indemnity limit secured to him under the casualty company's policy in his favor, and as to the excess he was without protection. The casualty company says there was nothing in the obligations of its policy which required it to put up a bond for five and one-half times the total obligation of its policy in order to secure a stay of execution. This may be true, but that is a very different question from the one of whether, having failed to put up such a bond, and thereby having failed to protect the assured while it proceeded with further litigation for its own benefit, the casualty company could deny the assured the right to take measures to escape the resulting disaster to him, except under penalty of forfeiting the protection, so far as it went, afforded him by the casualty company's policy."

This leads to a consideration of the principal question in the case. Was the judgment final in view of the fact that an appeal had been taken in plaintiff's behalf by the insurance company? Defendant argues that the payment by plaintiff was voluntary and that up to the time it was made there was no final judgment within the meaning of the policy. A similar question arose in Gooschin v. Mercer Casualty Co., 178 Wash. 114 (34 P. (2d) 435), called to our attention by plaintiff's counsel since this cause was argued orally. In that case a garnishment proceeding was brought to attach funds in support of a judgment for \$22,575.95, growing

[illegible]

out of an automobile accident. Subsequently defendant in the main action appealed from the judgment. The appeal was pending at the time the garnishment writ was issued. Defendant in the main action filed no supersedeas bond upon appeal, although at the time of the accident there was in full force and effect an insurance policy issued by appellant "against loss and expense by reason of liability imposed by law upon assured" arising out of such an accident as was the foundation of the judgment in the principal case. Appellant answered in the garnishment proceeding that it had no funds belonging to the defendant in the principal action, and the matter then proceeded to trial. At the trial appellant moved for a continuance until the appeal then pending in the main action could be determined, which was denied. After trial the court rendered a memorandum decision, holding that the policy was a liability rather than an indemnity policy, and entered judgment against appellant, holding that it was indebted to the assured in the sum of \$10,000. Upon the authority of Johnson v. McGilchrist, 174 Wash. 178, 24 P. (2d) 607, the court held that the indebtedness to the judgment creditor accrued by reason of liability imposed by law, when the judgment in the principal action was entered, making the judgment final, notwithstanding the pendency of the appeal.

It appears to us to be in accordance with authority and reason to hold that the insurance company's failure to stay the judgment by supersedeas left plaintiff no alternative except to settle the cause, and that to all practical intents and purposes the judgment against plaintiff became final when it became obliged to pay its share of the judgment in order to avoid a levy on its assets, notwithstanding the pendency of the appeal.

Defendant relies principally upon Roberts v. Central Mutual Insurance Co. (4th Dist., 1936), 285 Ill. App. 408, and several decisions wherein the Roberts case was cited with approval, in

support of its contention that the judgment herein was not final. The Roberts case involved a bond conditioned to pay final judgments as distinguished from an insurance against liability such as we have in the instant proceeding. Moreover, no effect was given in that case to the failure of the defendant in the main proceeding to file a supersedeas bond to stay the operation of the original judgment, and therefore we think that decision presents a different question.

The sum of \$2,806.40 consisted of \$2,500 agreed upon between the administratrix and plaintiff in settlement of the claim, plus interest from February 14, 1941 when the original judgment was entered, and court costs in the original suit which defendant unsuccessfully defended. In addition to the foregoing amount plaintiff had judgment for attorneys' fees and miscellaneous expenses incurred in settling the judgment after defendant repudiated its obligation, amounting to \$308.20. The policy makes no provisions for the assessment of attorneys' fees, and therefore the item of \$308.20 should have been disallowed. Plaintiff's counsel say "that if any error arose in taxing \$308.20 attorneys' fees as damages, it should be held to be harmless error because \$500 should have been taxed as costs for unreasonable and vexatious delay of payment." The case presents a novel question, and that contention is therefore untenable.

For the reasons indicated the judgment of the Circuit court in favor of plaintiff is affirmed as to the item of \$2,806.40 and reversed as to the allowance of \$308.20 for attorneys' fees and miscellaneous expenses.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

Scanlan and Sullivan, JJ., concur.

42976

WILLIAM WOLLSCHLAEGER et al.,
Plaintiffs,

v.

ALVINA ERDMANN et al.,
Defendants.

—
A. G. WIPPERMAN,
(Petitioner) Appellant,

v.

ALVINA ERDMANN,
(Respondent) Appellee.

A
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

52
323 I.A. 371

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by A. G. Wipperman and The First National Bank of Chicago from an order denying the prayer of their amended petition that an order that had been entered discontinuing the instant action, a partition suit, be set aside, and that a sale of the premises involved be had in accordance with the decree of sale that had been entered in the cause. By an order entered in this court the cause proceeded in the name of A. G. Wipperman as sole appellant.

William Wollschlaeger, Edna Mix and George Wollschlaeger, plaintiffs and cotenants of the premises in question, filed their complaint seeking partition of the premises, located at the northwest corner of Springfield avenue and Augusta boulevard, Chicago. Cotenants were the only parties made defendants and the only parties against whom summonses were prayed. While the record does not show that an amended complaint was filed, it would appear from the briefs that one was filed and appellant states that he was made a defendant to the same. The record does show that The First National Bank and A. G. Wipperman filed an answer "to the bill of complaint as amended," in which they allege a judgment in their favor against Anna Herzog, one of the cotenants, and claim a lien upon her interest in the premises.

with the intent of this time and again repeated in the past.

A. E.

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the only person who is not a member of the club.

It is not an accident that the same is true of the other two groups.

Small group for better and more effective group work

Prove that the sum of the first n terms of an A.P. is $\frac{n}{2}(2a + (n-1)d)$.

The cause was referred to a master in chancery, who made a report finding, inter alia, that plaintiffs were entitled to partition and also finding the interests of the cotenants in the premises. On March 6, 1936, the court entered a decree that approved the report of the master and made findings in accordance with the report and decreed that the premises be partitioned, and commissioners were appointed to make the partition. The commissioners made a report, in which they found that a partition could not be made without manifest prejudice to the parties concerned, and a decree was then entered approving the report of the commissioners and ordering that the premises be sold at public vendue by the master. No sale of the premises was ever made. On December 22, 1942, Edna T. Mix, one of the cotenants, filed a petition under Section 42 of the Partition Act, in which she alleges that all of the parties in interest have sold their interests to Alvina Erdmann, one of the cotenants, and that all of the parties that have any interest in the premises are willing that the suit be dismissed at plaintiff's costs and the proceedings stayed under Section 42 of the Partition Act. The petitioner asked that all of the said parties be ordered to plead *instanter* and make any objection to the dismissal of the cause if any they have or be decreed to have waived the same; and that all proceedings be discontinued. On December 22, 1942, the trial court entered an order finding that due notice of the proceeding had been given to all of the parties and that the petitioner is given leave to file her verified petition *instanter*, and that all parties are ordered to plead thereto *instanter*, and no parties pleading or asking for further time to plead, the petition is taken as confessed by all parties in interest; "that subsequent to the Decree of March 6, 1936, all of the parties having any interest in said

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[illegible]

property referred to in said Decree have adjusted their respective rights between themselves, or that further proceedings looking to said actual division have become unnecessary and further proceedings in said case are hereby discontinued and are hereby ordered discontinued." On September 15, 1943, the First National Bank and A. G. Wipperman filed a petition in which they set up the entry of the decree of partition entered in the cause; also the report of the commissioners and the decree of sale. The petition alleges that the petitioners had no notice of the filing of the petition of Edna Mix or of the hearing thereunder, or of the order of discontinuance entered on December 22, 1942, and had no knowledge of said matters until September 9, 1943. The petition prays that the order of December 22, 1942, be vacated and that the master in chancery be directed to make a sale of the premises in accordance with the decree of the court of April 27, 1936. Alvina Erdmann filed a motion to dismiss the said petition, upon the following grounds:

"1. It is apparent that the lien of petitioner's judgment in the amount of \$6,698.55 has expired. Said judgment was entered May 7, 1933 and, though more than seven years^{have} elapsed, said petition contains no allegation that the lien of said judgment was ever revived. Therefore, the petitioners have no standing in court and have no interest in or lien upon the real estate nor did they have any interest or lien upon said real estate when the order of discontinuance was entered.

"2. Petitioners have not now and never had any such interest in said real estate as would entitle them to demand a sale in partition. Petitioners' claim is as judgment lienors who have no right to force partition.

"3. The title holders had the right to discontinue the said suit without the consent of petitioners or over their

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objection. The right to file a partition suit is in the title holders, not in judgment lienors. The right to prosecute said suit and the right to discontinue is under the exclusive control of the title holders and not the lienors.

"4. The Court has lost jurisdiction to vacate the order of December 22, 1942, as more than thirty days have elapsed since its entry. It is apparent that petitioners had lost their lien on said real estate more than two and one-half years before the entry of said order. They, therefore, had no interest in said real estate on December 22, 1942 and are not entitled to notice of the motion for said order."

Upon a hearing of the petition of The First National Bank and Wipperman and the motion of Alvina Erdmann to dismiss the same, the court entered an order denying the prayer of the petition. The petitioners' notice of appeal prays that the said order be reversed and the cause remanded "with directions to vacate the order of discontinuance heretofore entered in this cause and to order a sale of the premises herein."

In our view of this appeal the only point necessary for us to decide is, Had the cotenants the absolute right to have the order of discontinuance of the proceedings entered. If that order was a proper one, no sale of the premises could take place, and the petitioner (appellant) states that if he is not entitled to a sale of the premises he would gain nothing by having the order discontinuing the proceedings vacated.

Section 42 of the Partition Act (ch. 106, par. 41, Ill. Rev. Stat. 1943) reads as follows:

"Adjustment of rights after decree of partition.] Sec. 42. In any case where, after decree of partition, and before

...The right to file a petition with the court
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division or sale is had (as the case may be), the parties in interest shall have adjusted the respective rights among themselves so that further proceedings looking to such actual division or sale become unnecessary, an order shall be entered discontinuing further proceedings, whereupon the decree of partition shall remain in full force and effect to determine the rights and interests of the parties as adjudicated therein, and there shall be no judicial division or sale of the premises, rights or interests pursuant to such decree."

This section was enacted in 1937, which was after the partition suit was commenced, but its provisions are remedial and therefore apply to a cause pending at the time of its enactment. (C. & W. I. R. R. Co. v. Guthrie, 192 Ill. 579, 580, 581; McKinley v. McIntyre, 360 Ill. 382, 388.) The order of discontinuance was not entered until December 22, 1942. The petitioner does not contend that Section 42 does not apply to the instant case. The respondent contends that Section 42, by its terms, expressly authorizes discontinuance by the cotenants - "the parties in interest" - after decree of partition and before sale is had. The petitioner concedes that the cotenants had the absolute right to dismiss the partition suit before the decree of partition was entered but he contends that when the decree of partition, which recognized the lien of his judgment on the interest of Anna Herzog, a cotenant of the property, was entered, he became "a party in interest" within the meaning of Section 42, and therefore the order of discontinuance could not be entered without his consent. After a careful study of Section 42 we are satisfied that the cotenants had the absolute right under that section to have the order discontinuing further proceedings entered.

A number of points raised by the petitioner and the respondent have been ably and exhaustively argued, but we are

-6-

not called upon to decide them upon this appeal.

The judgment order of the Circuit court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

-6-

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43004

HOME LAUNDRY & DRY CLEANING
COMPANY, (Plaintiff)

v.

Appellee,

FRANK HUNYADY, JR., et al.,
Defendants.

FRANK HUNYADY, JR.,
(Defendant)

Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frank Hunyady, Jr., defendant, appeals from the following order entered by Judge Fisher, in the Circuit court of Cook county, on October 25, 1943:

"THE HOME LAUNDRY & DRY CLEANING
COMPANY, a corporation et al

vs.

FRANK HUNYADY, JR., et al

323 LA. 37²

No. 43C 9109

" O R D E R

"On motion of Peden, Ryan & Andreas, attorneys for plaintiff, and this cause coming on to be heard upon the sworn complaint herein, and it appearing that pursuant to due personal notice upon the defendant, Frank Hunyady, Jr., and upon the sworn complaint, which alleges that the said Frank Hunyady, Jr. had failed and refused to deposit moneys of the corporation in the Evanston Trust & Savings Bank, and alleges that said Frank Hunyady, Jr. collected and received large sums, in excess of Fifteen Thousand Dollars, which he failed to so deposit and which he failed to enter on the books of the corporation and has retained and failed to account for; and the said sworn complaint further alleging that the said Frank Hunyady, Jr. has possession and charge of books as well as original records of business done, amount of money taken in and amount of money paid out, from which original records a

4-10-44

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE

vs.

JOHN EDGAR HOOVER
Defendant

JOHN EDGAR HOOVER
(Plaintiff)

Comes now

JOHN EDGAR HOOVER, Plaintiff, and

JOHN EDGAR HOOVER, Defendant, and

JOHN EDGAR HOOVER, Defendant, and

JOHN EDGAR HOOVER, Defendant, and

JOHN EDGAR HOOVER, Defendant, and

vs.

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JOHN EDGAR HOOVER, Defendant, and

true and complete set of books should have been set up and kept; and the said sworn complaint further alleging that said Frank Hunyady, Jr. refused and failed to make proper accounting, and further alleging that he had removed from the place of business of said corporation said original records and said books of said corporation; and,

"It appearing that on August 23, 1943, an order was entered upon said Frank Hunyady, Jr. and others, forthwith to deliver to and upon the premises of The Home Laundry & Dry Cleaning Company and to the custody of Oscar Isberian, as receiver, all books, records, vouchers, and the corporate seal of said corporation, and especially that they deliver all invoices or agaries, vouchers, checks, bank statements, customers lists and records of customers, cash books, journals, route records, ledgers and other books and accounting records or cards, the minute book of the corporation, stock certificate record and register, and any other books or records or any cash, automobile, truck, wagon, machinery or other assets of said corporation, in his hands or under his control, forthwith; and,

"It further appearing that a certified copy of said order was served upon said Frank Hunyady, Jr.; and,

"It further appearing that pursuant to a petition of the receiver on file herein, a rule to show cause was entered on August 26, 1943, requiring Frank Hunyady, Jr. to show cause for failure to comply with said order entered on August 23, 1943, and said Frank Hunyady, Jr. having failed to show cause, and this Court, by order entered on August 27, 1943, having issued a writ of attachment against said Frank Hunyady, Jr., and that he was brought into court, in the custody of the Sheriff of Cook County, on September 27, 1943; and,

"It further appearing to the Court, and from the records in this cause, that said Frank Hunyady, Jr., on September 27,

[illegible]

1943, admitted to this Court to having taken the sum of Seventeen Hundred Dollars belonging to The Home Laundry & Dry Cleaning Company, and admitted having taken the same after August 23, 1943 (the date when the receiver herein was appointed), and said Frank Hunyady, Jr. having been, by order entered September 27, 1943, found guilty of contempt of this Court, and having been ordered to deliver all books, records and property of said The Home Laundry & Dry Cleaning Company in his possession to Oscar Isberian, the receiver herein; and Oscar Isberian, the receiver herein, having been engaged in attempting to carry on and liquidate the property and affairs of said corporation; and the hearing on said matter having been continued from time to time to this date, and the defendant, Frank Hunyady, Jr., being present in open court and represented by counsel, and said Frank Hunyady, Jr. having wilfully failed to turn over said sum of Seventeen Hundred Dollars, which he so admitted having taken and to have possession of, to said receiver, and he having turned over only a part of the books and records of said corporation, and his said conduct being wilful and contumacious and its consequences having resulted in interference with the processes of this court, and said Frank Hunyady, Jr. being in flagrant, open and wilful contempt of this court, and persisting therein, and having failed to purge himself by complying with the orders heretofore entered upon him;

"It Is Ordered that the Sheriff of this county take the body of Frank Hunyady, Jr. and him safely keep in custody until said Frank Hunyady, Jr. shall pay and turn over said sum of Seventeen Hundred Dollars so in his possession, together with all books, records and property of said corporation in his possession, to the said Oscar Isberian, the receiver herein, or until he shall be otherwise discharged by processes of law;

"To which order Frank Hunyady, Jr. excepts and prays

an appeal, and it is ordered that the appeal bond be, and it is hereby, fixed at the sum of Four Thousand Dollars, with surety to be approved by this court." (*Italics ours.*)

The record in this case is incomplete and the abstract filed by defendant (hereinafter called appellant) is neither complete nor correct.

There is no merit in the main contention of appellant, that "the record fails to disclose that there was sufficient opportunity given the defendant, Frank Hunyady, to purge himself of the charge of contempt and the defendant was not accorded the fullest opportunity to defend himself." The report of proceedings in the record gives only a report of proceedings before Judge Fisher on October 25, 1943, and it is upon this report that appellant bases his contention that he was not given sufficient opportunity to purge himself of the charge of contempt and was not accorded the fullest opportunity to defend himself, but, from the judgment order entered on that day, indeed, from the said report of proceedings, it clearly appears that on September 27, 1943, appellant had his day in court and was found guilty of contempt on that day. It is true that a new counsel for appellant, on October 25, stated to the court that he would like to put his client on the stand and have him explain matters to the court, but it is also true that the court stated that he had found appellant guilty upon a prior hearing of the cause and that it was then too late for him to offer evidence. The court further stated that after he found appellant guilty upon the prior hearing he offered appellant an opportunity to purge himself but that appellant had failed to take advantage of the offer; that upon the prior hearing he (the trial court) had stated that in sentencing appellant he would take into account the good faith he demonstrated in enabling the court to determine just what the situation was, but that it was now apparent that appellant does not realize what good faith is.

an appeal, and it is ordered that the appeal be allowed, and it is hereby, fixed to the end of the month of June, 1941, to be allowed by the court, (limited time).

The record in this case is hereby ordered to be placed in the hands of the court (limited time) for a final judgment, and the court is hereby ordered to make a final judgment.

There is no appeal in this case, and the court is hereby ordered to make a final judgment.

That the record in this case is hereby ordered to be placed in the hands of the court (limited time) for a final judgment, and the court is hereby ordered to make a final judgment.

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now appellant that appellant does not realize that he is not guilty, and the court is hereby ordered to make a final judgment, and the court is hereby ordered to make a final judgment, and the court is hereby ordered to make a final judgment.

Between the time of the hearing wherein Judge Fisher found appellant guilty and October 25, twenty-eight days intervened. It seems clear that the contempt of appellant shown in the court's orders was persistent and contumacious and that Judge Miner and Judge Fisher were over-patient with appellant. It is significant that appellant has not seen fit to present a report of the proceedings that took place before Judge Fisher when he was found guilty of contempt.

Appellant contends that he "has been placed in double jeopardy in that the entry of the order of Judge Miner dated August 27, 1943 passes upon the identical subject matter and is a direct commitment to the custody of the sheriff of this county to be held in the common jail of Cook county and any subsequent hearings thereafter and specifically the order of October 25, 1943, is double jeopardy and is a nullity." We assume from the very short argument made in support of the above contention that appellant seeks to raise the defense of former jeopardy, and it is sufficient to say in answer thereto that the record fails to show that such a defense was formally interposed or even suggested in the proceedings before Judge Fisher. Such a defense, if not interposed in apt time in the trial court, is waived; a fortiori, it cannot be raised for the first time in this court. From what we have just stated it must not be inferred that we are of the opinion that there would have been merit in the said defense if it had been interposed in apt time. We have considered two other contentions raised by appellant but find no merit in either.

A motion was filed in this court by plaintiff and the receiver to dismiss the instant appeal and we reserved judgment upon the motion until the final hearing. While the motion has considerable merit, we have concluded to deny it.

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

Date

42881

VAN BORN REALTY CORPORATION,
a corporation,

Appellant,

APPEAL FROM SUPERIOR

v.

COURT, COOK COUNTY.

DANIEL L. SVEHLA and GENEVIEVE
SVEHLA,

Appellees.

323 I.A. 408

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Van Born Realty Corporation, to recover \$700 earnest money alleged to be due and owing to it from defendants, Daniel L. Svehla and Genevieve Svehla. Defendants' motion for a directed verdict was sustained and the jury returned a verdict finding the issues in their favor. Judgment was entered on the verdict and plaintiff appeals.

Plaintiff was engaged as a real estate broker by Walter Van Guilder and Elizabeth Van Guilder to secure a purchaser for their improved residential property at 1426 Jackson Avenue, River Forest, Illinois. Plaintiff submitted the property to defendants who signed a contract to purchase same for \$12,500. The owners refused to sell at that price but agreed to sell for \$13,000. On the same day, April 29, 1941, defendant Daniel J. Svehla agreed to the increased purchase price. The price was changed on the face of the contract theretofore signed by defendants and Daniel J. Svehla initialed ^{thereon.} such change. There was evidence that his wife, Genevieve Svehla, assented to said increase. Later that day the contract was signed by the Van Guilder. In connection with the execution of the contract and pursuant to its terms defendants delivered to plaintiff a check for \$700 payable to its order in payment of earnest money to be applied on the purchase price. The following morning, April 30, 1941, plaintiff deposited the check in the Suburban Trust and Savings Bank of Oak Park, Illinois. Before the check cleared, defendant Daniel J. Svehla stopped payment on it on

thereon.

May 3, 1941. On May 5, 1941 plaintiff was notified by the Suburban Trust and Savings Bank that payment had been stopped on the check. The record discloses evidence which shows or tends to show that defendants repudiated the contract and wrongfully refused to purchase the property.

Plaintiff predicates its right to maintain this action in its own name upon the real estate sale contract entered into between the Van Guilders and the defendants and upon the foregoing facts. It relies particularly upon the following provisions of said contract:

"This contract and earnest money shall be held in escrow by Van Beren Realty Corp. for the mutual benefit of parties hereto, and after consummation the canceled contract may be retained by the escrowee. Unless buyer be entitled to a refund of earnest money, it shall be applied first to payment of expenses incurred for seller by said broker, and second to payment of said commission, balance, to be paid to seller."

The record does not disclose upon what ground the verdict was directed but it is suggested that the trial court held that plaintiff had no such interest in the subject matter as entitled it to recover from defendants. If plaintiff has a special interest in the earnest money required to be paid under the contract that entitles it to recover same in its own right, there can be no question but that it made out a *prima facie* case as to defendants' wrongful cancellation of the check, which they delivered in payment of the earnest money.

Therefore the only question necessary to be considered in determining the propriety of the trial court's action in directing the verdict is whether plaintiff, which was not a party to the contract, has the right as the real estate broker in the transaction to maintain this suit in its own name. No case has been cited and we have been unable to find one where the right of a real estate broker to predicate an action on a real estate contract under a factual situation comparable to that here shown has been considered or determined. ✓

and it is not, as I have already said, a matter of the
merest detail, but a matter of the highest importance
to the world. The world is not a mere collection of
things, but a living organism, and it is the duty of
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Plaintiff contends that "an agent may sue in its own name to recover money of its principal of which it has been deprived by the wrongful act of another" and states in its brief that "plaintiff as seller's agent, upon receipt of such money, became liable to him for it." Plaintiff's position in this regard is not tenable either under the law or the facts. It did not receive the earnest money in cash nor did it ever have it in its possession. It did receive defendants' check in payment of the earnest money, which it was diligent in depositing. Plaintiff could not possibly be held liable by the sellers because defendants wrongfully stopped payment on the check, since it accepted it in good faith in payment of the earnest money and was diligent in depositing it for collection. In support of its instant contention plaintiff cites Kent v. Bernstein, 94 Mass. 342, and Parks v. Fogleson, 97 Minn. 157. In the Kent case an agent had received a sum of money in small bills for his principal. He was fraudulently induced to exchange the genuine bills for a fifty dollar counterfeit bill. There the agent sued the party who had defrauded him and it was held at p. 344: "It cannot therefore be said that the plaintiff has no beneficial interest in the cause of action on which this suit is brought. On the contrary, it plainly appears that his right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him." In the Parks case an agent had received money from his principal to be used in payment of certain grain purchases. By mistake the agent overpaid the seller of the grain, who refused to return the excess payment. The agent sued the seller. The court held at p. 159: "The plaintiff's cause of action in his own right was then complete, for he had a special property in the money by reason of his possession and the fact that he was liable primarily for it

to the general owner thereof, who was not bound to pursue the defendant." Neither of these cases has any application to the case at bar. In both cases the agents had money in their possession which belonged to their principals and they parted with the possession thereof under such circumstances that rendered them liable to their principals. It was properly held that the agents in those cases had a special property in the money and that they had a right to sue for its return.

Plaintiff further contends in its original brief that ✓
"an agent who acquires an interest in the subject matter of its agency may sue to protect its interest" and that it has a right to maintain this action in its own name as a third party beneficiary under the contract. It is unnecessary to discuss this contention, since plaintiff's beneficial interest in the contract was merely incidental and it concedes in its reply brief that it cannot maintain this suit as a third party beneficiary.

The only other case cited by plaintiff, which it claims supports its position that it has a right to maintain this action, is Thompson v. Kelly, 101 Mass. 291. That case involved the right of auctioneers to sue in their own names for a deposit that a purchaser of real estate at auction failed and refused to pay. It appeared that after the property had been knocked down to Kelly upon his high bid at the auction he signed a written acknowledgment of his purchase and on the same instrument the owners of the premises executed their confirmation of the sale. Attached to said instrument was a "memorandum of terms and conditions of sale," one of which was the requirement: "\$200 to be paid down into the hands of the auctioneer to bind the bargain, and to be forfeited to the use of the seller in case the purchaser shall fail to comply with the residue of the terms of the sale, or refunded to him in case of a material defect in the title." Kelly did not have the \$200 with him to pay the required

deposit and it was agreed between him and the auctioneers that he might go to his store and get it and pay it shortly thereafter. The deposit was never paid by Kelly and, as already shown, the auctioneers sued him for it. There the court said in its original opinion at pp. 296 and 297: "But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase money, may become necessary." However, on petition for review (rehearing) an additional opinion was filed in which the court said at p. 299: "If the money had been paid to the auctioneers, they would have received it only as agents for the seller. It is because they gave credit to the petitioner at his request, and relied upon his express promise to place the amount in their hands at an early day, that they are entitled to maintain their action against him." It will be noted that in its final opinion in that case the court held that the auctioneers had no right to maintain an action against Kelly on the written contract between the owners of the property and the defaulting purchaser but that they were entitled to maintain their action against him on his express oral promise to them that he would pay the deposit if they gave him sufficient time to go to his store and get the \$200. Certainly neither the reasoning of the court in that case nor the conclusion reached by it in either its original or final decision can be said to have any application to the instant case.

While it is true that plaintiff was deprived of a commis-

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sion which it would have been entitled to receive if the earnest money had been paid and the sale had been consummated, the contract was made, according to its terms, for the mutual benefit of the parties thereto and any right of action that may have accrued thereunder because of the alleged wrongful stopping of payment on the earnest money check by defendants and their repudiation of their contract belonged exclusively to the Van Guilders.

We are impelled to hold that plaintiff had no such interest in the subject matter as entitled it to maintain this action and that the court properly directed the verdict in favor of defendants.

For the reasons stated herein the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

42897

JAMES J. BARBOUR,
Appellant,

v.

THE WILLETT COMPANY, a
corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

323 I.A. 438²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, James J. Barbour, to recover \$10,000 from The Willett Company on an alleged implied agreement of defendant to pay that amount as rent for certain garage storage space for a period of nine months. A verdict was returned by the jury finding the issues against defendant and assessing plaintiff's damages at \$60. Plaintiff appeals.

The complaint alleged substantially that plaintiff paid \$50 for a quit claim deed to the premises located at the northwest corner of Vernon Park place and Desplaines street, Chicago, Illinois; that when he acquired title thereto, a receiver theretofore appointed by the Circuit court in a foreclosure proceeding then pending therein was in possession of the premises; that said proceeding was brought to foreclose a trust deed against the property and same was sold on March 19, 1941 by a master in chancery pursuant to a decree of foreclosure and sale; that defendant as a tenant of the receiver occupied a portion of the first floor of the building in question; that plaintiff redeemed the property on March 16, 1942 from the foreclosure sale by the payment of \$1,903.66, which included the amount for which the property had been sold by the master and interest thereon; that the redemption was made within 12 months after the date of the foreclosure sale; and that after plaintiff made said redemption he caused to be delivered to the president of the defendant company the following notice:

724

[Faint handwritten notes at the bottom of the page]

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: 00101

"April 9, 1942

"To The Willett Company:

"YOU ARE HEREBY NOTIFIED that I am the owner of the real estate situated in the City of Chicago, County of Cook and State of Illinois, described as (legal description follows), being located at the Northwest corner of Vernon Park Place and Des Plaines Street; that I acquired title thereto by deed of conveyance dated the 14th day of March, A. D. 1942, acknowledged and recorded in the Recorder's Office of Cook County, Illinois, the 16th day of March, A. D. 1942 ***; that after acquiring such title I did, on March 16, A. D. 1942, redeem the said premises from the foreclosure sale which had been held March 19, A. D. 1941, in the suit formerly pending in the Circuit Court of Cook County, Illinois, *** and caused a certificate of such redemption issued by John A. Cervenka, Jr., Master in Chancery, to be recorded in said Recorder's office on March 16, 1942 ***. I am informed that you occupy a portion of said real estate, claiming a right to so occupy it as a tenant of the Receiver heretofore appointed in said suit.

"YOU ARE HEREBY NOTIFIED that the said Receiver had no power or authority to make any lease of said premises which would extend beyond the inception of my right of possession of said premises and if you continue to occupy the portion of said premises now occupied by you for more than thirty days beyond the inception of my right of possession of said premises I will treat you as my tenant for a term of nine months from the inception of my said right of possession and at a rental of \$10,000 for the said nine months period, payable in advance. If you desire to occupy the said premises, as my tenant for a longer period of time or at a different rental you may see my attorney, Edward H. S. Martin, whose office is at Room 1140 Otis Building, 10 South LaSalle Street, Chicago, Illinois, and he will probably be able to arrange terms satisfactory to you. Unless, however, such other terms are made the rent will be as hereinbefore stated.

James J. Barbour."

The complaint further alleged that defendant "has ever thereafter remained in possession of said first floor and has never paid any rent therefor to plaintiff nor arranged any terms with plaintiff for occupancy of said premises, or any part thereof other than the terms mentioned in said notice;" and concluded with a prayer for judgment against the defendant for "\$10,000, the rent specified in the said notice for the nine months period mentioned in the said notice, together with interest thereon."

Defendant's answer denied the material allegations of the complaint.

THE UNIVERSITY OF CHICAGO

Defendant's answer denied the existence of the
agreement in the said notice, together with the same.
The court specified in the said notice for the time for the filing
with a copy for the court and the clerk of the court.
Of other than the time mentioned in the notice, and defendant
with plaintiff for so much of said notice, or any part thereof
never paid any part thereof to plaintiff nor any part thereof
thereafter mentioned in the notice of said notice and has
the said notice alleged that defendant has not

1911

Defendant is engaged in the trucking business and its main garage and a large lot used in connection therewith are directly across the street from the property purchased and redeemed by plaintiff. This property is 120 by 180 feet and a three story brick building had been erected thereon 60 or 70 years ago. There were stores on the first floor on the Desplaines street side, apartments on the second and third floors and a portion of the first floor on the Vernon Park place side was formerly used as a barn or a garage. The entire building, including the garage space, was stove-heated and in "very poor condition." Photographs in evidence show that the garage was in a very delapidated condition.

On April 5, 1942 defendant arranged with the receiver to rent the garage space, about 50 foot square, for \$25 a month on a month to month basis. It paid \$25 in advance on said date for one month's rent and immediately moved some obsolete and junked trucks, from which the tires had been removed, into said garage space from its own lot. When defendant received plaintiff's notice of April 9, 1942, heretofore set forth, it immediately turned same over to the receiver, who filed a petition in the foreclosure proceeding to enjoin plaintiff from interfering with said receiver's possession of the property. After a hearing on the receiver's petition and plaintiff's answer thereto, an order was entered restraining plaintiff from interfering with the receiver's possession of the property, Upon plaintiff's appeal from such order it was affirmed by the Appellate court. The order was not interlocutory but, after affirmance, it was a final determination of the receiver's right to the possession of the property during the period of his receivership. Defendant made further rental payments of \$25 a month in advance to the receiver on May 5, 1942 and June 5, 1942. On June 20, 1942 the following notice was sent by the receiver to all of the occupants of the building,

including defendant:

"Chicago, Illinois
June 20th, 1942

"To all occupants of the building, or any part thereof, known as Numbers 612 to 622 South Desplaines Street and 700 to 716 West Vernon Park Place, and garage or stable in the rear thereof, in the City of Chicago, County of Cook and State of Illinois:

"YOU ARE HEREBY NOTIFIED that on June 19th, 1942, the period of redemption expired and my right to possession as Receiver is now at an end. James J. Barbour is the present owner of said premises and you are now his tenant subject to such terms as you and he can agree upon for your further occupancy of the premises.

Frank A. Sloan,
Receiver, Chicago Title and
Trust Company versus Dollie Leitch
Circuit Court."

According to the undisputed testimony of Raleigh Baum, defendant's traffic manager, plaintiff's attorney, Edward H. S. Martin, came to his office in June or July, 1942 and requested \$60 a month rent if defendant desired to continue to occupy the garage space and he (Baum) offered \$35 a month rent, which Martin refused to accept. On July 5 or 6, 1942 defendant removed all of its property from plaintiff's premises to its own lot. Baum testified that Attorney Martin telephoned him early in August; that "he said that he understood that we were still in the property, that we had some stuff there, which I didn't know anything about; and all he said at that time was, 'You are going to be sued.'" Robert Anderson, defendant's general manager, testified that he was apprised by Baum of Attorney Martin's telephone call; that on the following morning, August 7, 1942, he took some men over to plaintiff's premises to remove therefrom defendant's property, which Attorney Martin had complained about; that the garage was locked and he could not gain entrance thereto until one Kemp, who was a tenant in one of the apartments and appeared to be plaintiff's janitor, produced a key and opened the lock on the garage door; that defendant's employees then moved 7 or 8

1000

Chicago Sun wagons from said garage. It appeared that the Chicago Sun wagons had been moved into plaintiff's garage about July 22, 1942 by one of defendant's employees on his own initiative and without being authorized to do so by any of his superiors and without their knowledge. It was shown by undisputed evidence that the reasonable rental value of the garage space in question was not in excess of \$25 a month.

Plaintiff's claimed right to recover \$10,000 from defendant for rent of the garage space for a period of nine months is predicated solely on his notice ~~to defendant~~ of April 9, 1942 and his offer contained therein. That notice recited his acquisition of the title to the premises in question on March 14, 1942 and his redemption of the property on March 16, 1942 from the foreclosure sale, which was had on March 19, 1941. It clearly appears from said notice that plaintiff represented to defendant therein that his right to the possession of the property had its inception on the day he redeemed it, which was just a few days before the expiration of the twelve month redemption period. No suggestion is made in the notice nor is any reference made therein to any other day, date or time when his right to possession had its inception. It will be noted that the notice of April 9, 1942 advised defendant that "said receiver had no power or authority to make any lease of said premises which would extend beyond the inception of my right of possession of said premises and if you continue to occupy the portion of said premises now occupied by you for more than thirty days beyond the inception of my right of possession of said premises I will treat you as my tenant for a term of nine months from the inception of my said right of possession and at a rental of \$10,000 for said nine months period, payable in advance." The notice cannot be reasonably construed otherwise than that it meant just what it said as to when plaintiff claimed his right to the

possession of the property accrued and it is susceptible of no other construction than that the inception of his right to possession was on March 16, 1942, when he redeemed it. It was solely because he attempted to assert his right to possession as of that date that the receiver instituted the injunction proceeding in the foreclosure suit that resulted in the order restraining plaintiff from interfering with the "peaceful possession of the receiver during the time he shall continue as receiver." The effect of the injunction order was to confirm the receiver's right to the possession and control of the property until June 19, 1942 and to deny plaintiff's right to the possession thereof on March 16, 1942 or at any time thereafter until June 20, 1942. Plaintiff having no right to the possession of the property when he served the notice of April 9, 1942 on defendant, such notice was wholly ineffective as an offer of rental predicated on his right of possession on March 16, 1942, when he redeemed the property. Plaintiff sought by said notice to contract for the rental of property that he had no right to rent at that time.

But it is urged in effect that the notice was so artfully drawn that it should be construed as referring to plaintiff's right to possession, whenever it had its inception. In other words, it is claimed that although plaintiff had no right to possession until June 20, 1942, the notice of April 9, 1942 and the offer contained therein should be held to have continued in effect until after the receiver had relinquished control and possession of the property at the expiration of the fifteen-month redemption period on June 19, 1942. The difficulty with plaintiff's position in this regard is that the notice of April 9, 1942 related solely to his claimed right to possession on March 16, 1942, when he redeemed the property, and, as has been seen, the effect of the order entered in the foreclosure proceeding enjoining plaintiff

from interfering with the right of possession of the receiver was to extinguish and destroy plaintiff's notice to defendant of April 9, 1942 and the offer contained therein. Since plaintiff's offer to rent the garage space to defendant for \$10,000 was for a period of nine months commencing "not more than thirty days" after he redeemed the property on March 16, 1942 and since it was made at a time when he had no right to the possession of the property or to rent same, there could not have been a valid acceptance.

Even though it be assumed that plaintiff's notice of April 9, 1942 continued in effect and constituted a valid offer to defendant as of June 20, 1942, when his right to the possession of the property actually did accrue, defendant did not "continue to occupy" the garage space "for more than thirty days beyond the inception of plaintiff's right of possession." Defendant removed all of its property from the premises on July 5 or 6, 1942, when it was unable to agree with plaintiff's attorney on a fair rental for its continued occupancy. Defendant having removed its property within thirty days from June 20, 1942, there was no continued occupancy of the premises by it, which could possibly be considered as an implied acceptance of plaintiff's rental offer of \$10,000 for a nine-month period. To support his implied acceptance theory plaintiff must then rely solely upon the fact that one of defendant's employees, on his own initiative, moved 7 or 8 Chicago Sun wagons from its lot into plaintiff's garage on July 22, 1942, where they remained until August 7, 1942, when Attorney Martin telephoned defendant's traffic manager and told him that some of defendant's property was at that time in plaintiff's garage and that defendant was "going to be sued." The Chicago Sun wagons were immediately removed and it clearly appears that defendant's employee, who placed said wagons in plaintiff's garage, did so without authorization or direction from any of his superiors. Even

if plaintiff's notice and offer of April 9, 1942 had subsisted during the sixteen day period the Chicago Sun wagons were in his garage, in our opinion this was not such an occupancy of the premises as constituted an implied acceptance of his offer and entitled him to recover \$10,000 rent from defendant.

Since the only offer made by plaintiff to rent the garage to defendant for \$10,000 for a nine-month period was contained in his notice of April 9, 1942 and since that notice was extinguished and nullified by the injunction order entered in the foreclosure proceeding, there never was a valid offer made by plaintiff to rent the garage to defendant for \$10,000 for a nine-month period and therefore there could not have been an acceptance by implication or otherwise.

Plaintiff's claim viewed in any light is entirely lacking in merit. The allowance by the jury of \$60 damages to plaintiff undoubtedly represented what it considered sufficient compensation for the period the Chicago Sun wagons were in his garage.

For the reasons stated herein the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

1

It is the duty of the State to protect the rights of its citizens and to maintain the public peace. In the exercise of this duty, the State is authorized to take such measures as may be necessary to preserve the public order and to prevent the commission of crimes.

Since the only way to preserve the public order is by the maintenance of the law, it is the duty of the State to see that the law is enforced. To this end, the State is authorized to create and maintain a system of courts and to appoint judges to preside over these courts. It is also the duty of the State to provide for the maintenance of the public peace by the creation and maintenance of a system of police and to appoint officers to maintain the peace.

It is the duty of the State to protect the rights of its citizens and to maintain the public peace. In the exercise of this duty, the State is authorized to take such measures as may be necessary to preserve the public order and to prevent the commission of crimes. To this end, the State is authorized to create and maintain a system of courts and to appoint judges to preside over these courts. It is also the duty of the State to provide for the maintenance of the public peace by the creation and maintenance of a system of police and to appoint officers to maintain the peace.

Very respectfully,
[Signature]

Witness my hand and seal this 1st day of January, 1901.

42924

CHARLES, PHILIP and
GEORGE MOULOPOULOS,
Appellants,

v.

THE NORTHERN TRUST COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

323 I.S.A. 639

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs Charles, Philip and George Mouloupoulos, against defendant, The Northern Trust Company. On defendant's motion plaintiffs' amended complaint was stricken and their suit dismissed. From such order of dismissal plaintiffs prosecuted an appeal directly to the Supreme court, which transferred the cause to this court. In transferring the cause the Supreme court filed an opinion (Mouloupoulos v. Northern Trust Co., 384 Ill. 41 [Advance Sheets No. 1]), in which it set forth the nature of plaintiffs' complaint, the proceedings in the trial court and the result thereof as follows:

"This appeal seeks the reversal of an order of the circuit court of Cook county striking the complaint and dismissing the suit of appellants, George Mouloupoulos, Charles Mouloupoulos and Philip Mouloupoulos, against defendant, the Northern Trust Company, of Chicago. The complaint contained no designation as to whether it was in law or equity, but the cause was placed on the chancery docket. In sustaining a motion to strike, the chancellor entered an order finding the complaint insufficient as to the equitable issues and gave plaintiffs leave to amend within twenty days by setting forth any equitable issues in separate counts. In the same order the law issues or causes of action were by the court transferred to the law side for disposition on the motion to dismiss. A motion to vacate that order was denied and another judge, hearing the law calendar, sustained the motion as to all law issues and gave plaintiffs five days to amend. On the failure of plaintiffs to meet the rule an order was entered dismissing the suit at their costs.

*** Since neither party gained nor lost a freehold as a necessary result of the order appealed from, our inquiry must be limited to the question whether the title to a freehold is so put in issue by the pleadings that a decision of the case necessarily involves a determination of such issue. (Lederer v. Rosenston, 329 Ill. 89; United Electric Coal Cos. v. Keefer Coal Co., 338 Ill. 288.) In order to arrive at a

solution of the problem, it is necessary to analyze the complaint which contains many confusing averments and a prayer for relief that does not aid in clarifying the pleadings.

"Eliminating excess verbiage, the complaint as amended avers, in substance, that defendant, as executor of the estate of Edward H. Pitkin, deceased, and as such claiming to be the owner of a \$40,000 note secured by a trust deed or mortgage on certain Cook county real estate belonging to plaintiffs, filed a suit to foreclose, which resulted in the appointment of a receiver for said properties, a decree for the sale of the premises, the purchase thereof by The Northern Trust Company and a deficiency decree for \$9,528.77. It is then averred that shortly prior to the institution of the foreclosure proceedings The Northern Trust Company, through its duly authorized officers, entered into an oral agreement with George Mouloupoulos and Charles Mouloupoulos, who had acquired the interest of Philip Mouloupoulos, by which the executor agreed that upon the conclusion of the foreclosure proceedings and after the procurement of a deed to the premises, the purchaser would deliver to George Mouloupoulos a contract for a warranty deed thereto for a sum equal to the amount due on the mortgage, plus interest, taxes advanced and costs of suit, less rentals and other income collected from said premises, the said amount to be paid by George Mouloupoulos in monthly or quarterly payments. The complaint then contains many charges of misconduct by the receiver and his attorneys who were also attorneys for The Northern Trust Company, after which it is alleged that The Northern Trust Company and its attorneys not only took charge of the foreclosure proceedings, but of 'all and every interest and absolutely dictatorial control over every interest of defendants, or equity owners, *** for the purpose of complying with and living up to the terms of the agreement,' and that after the deed was delivered by the master to the said executor as purchaser, after the expiration of the period of redemption, the said purchaser, The Northern Trust Company, has persistently and consistently refused to comply with the original agreement and to reconvey said premises to the 'plaintiffs,' in accordance with said agreement. Additional averments are, that the receiver reported and had the court approve a less amount of rent collected than that called for in two leases; that he renewed one lease five months prior to its expiration date for a reduction in rent, so that plaintiffs lost \$3,066, which should have been applied on the deficiency decree and that the receiver made various wrongful expenditures which aggregated \$2,160.99.

"The relief prayed is that the acts and doings of The Northern Trust Company, representing itself to be the owner of the note and trust deed, the acts and dealings of the receiver, the representation, inducements and promises made by The Northern Trust Company, which prevented representatives of complainants from defending vigorously the allegations of fraud and deception, the motives and effects thereof, the reduction of rentals, the charges, expenditures and allowance of fees and 'any subsequent acts affecting the title to said premises since the institution of the original proceedings,' be inquired into. The prayer for relief concludes with the request that the court find that this proceeding is not an attempt to review a former judicial proceeding but that it is an original proceeding based upon fraud by The Northern Trust Company to the damage of the plaintiffs in the sum of \$200,000.

"The grounds set forth in the motion to strike are: (a) that the alleged agreement is in violation of the statute of frauds; (b) that it is without consideration; (c) that the allegations are mere conclusions; (d) that the nature and extent of the damages are not stated; (e) that the decrees entered in the foreclosure proceedings are res judicata; (f) that the action is barred by limitation; and, (g) that the complaint states no facts entitling plaintiffs to relief in law or equity.

"It is apparent from the most liberal view of the pleadings that no freehold is involved. If the action is one for damages only, as the final prayer for relief indicates, it is not a question for this court. It is true plaintiffs allege in their petition that The Northern Trust Company, before their foreclosure proceedings, while acting as trustee of the Edward H. Pitkin estate, agreed with George Mouloupoulis, a coplaintiff, and his attorney, to foreclose the trust deed and, upon receipt of a master's deed, to deliver to George Mouloupoulos a contract for a warranty deed to said premises. However, no particulars of the agreement are set forth alleging the amount to be paid or time the agreement was to run. No averments are made that George Mouloupoulos ever offered to perform or was able to carry out and perform this alleged oral agreement. The petition does not pray that the alleged agreement be enforced or that appellee be decreed to convey the premises upon the payment of the amount due on the mortgage. Neither does it allege that any offer was made to pay such sum. The suit could not result in one party gaining and the other losing a freehold estate, and conceding that the contract, as alleged, was made, appellants would only become entitled to a conveyance upon performance on their part. (Kesner v. Miesch, 204 Ill. 320.) *** It is true that the Civil Practice Act shall be liberally construed to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. However, we must not lose sight of the most important rule and one which should always be kept in mind as provided by the Civil Practice Act, that it 'shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity.' Ill. Rev. Stat. 1941, chap. 110, par. 155, sec. 31.

"The petition is replete with charges of fraudulent injuries to the plaintiffs and of fraudulent acts on the part of the defendant but such fraudulent acts are stated in general terms. The cause of action, if any, by such allegations as appear therein would be for damages for alleged fraudulent injuries to the plaintiffs."

Counsel, who drafted and filed plaintiffs' complaint and the amendment thereto and who prepared and filed their brief on appeal, no longer represents them. Counsel who appeared for plaintiffs on the oral argument of the case in this court conceded that the allegations of the amended complaint are jumbled and incoherent and failed to state ~~any~~ facts constituting a cause of action, either at law

or in equity.

The amended complaint being admittedly insufficient to afford plaintiffs either the relief sought therein or any other relief, it follows that the propriety of the order of the trial court striking same and dismissing the suit is likewise admitted.

The order of the Circuit court of Cook county is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

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LAURIE SWEANY and
VIRGINIA MALONEY,
Appellees,

v.

WALGREEN COMPANY, Inc.,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

323 I.A. 439²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Laurie Sweany and Virginia Maloney, to recover damages for personal injuries claimed to have been sustained by them as the result of having eaten allegedly unwholesome food at a drug store operated by the defendant, Walgreen Company. The jury returned a verdict finding the defendant guilty as to plaintiff Laurie Sweany and assessed her damages at \$550. There was also a guilty verdict against defendant as to plaintiff Virginia Maloney and her damages were assessed at \$450. Judgments were entered on both verdicts, from which defendant appeals. Defendant's motions for a new trial and for judgments notwithstanding the verdicts were overruled.

Plaintiffs were both 21 years old and in good health when they left their homes on the morning of May 16, 1941. They went to one of defendant's drug stores for lunch that day, after having spent the morning touring the City Hall of Chicago with a number of fellow students of the social science class of the Chicago Teacher's College. They both ordered and were served the same kind of food for lunch: creamed shrimps with mushroom sauce on toast and tea.

Laurie Sweany testified that she ate all the shrimps served her, that they tasted all right and that in so far as she noticed, their color seemed to be all right; that when they finished their lunch she and Miss Maloney returned to the City Hall to attend a lecture in the City Council Chamber; that after they had listened to the lecture for a short time, she

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This notice is hereby given that the undersigned, being a duly qualified person, has been appointed by the Board of Directors of the City of New York, to act as a member of the Board of Education, and to perform the duties of such office, and to receive the salary of such office, and to be subject to the removal of the Board of Directors at any time.

Witness my hand and seal this 10th day of January, 1903.

JOHN J. HENRY, Mayor of the City of New York.

broke out in a cold perspiration and became very nervous and weak; that she left the lecture room, went out into the hall and began vomiting; that Miss Maloney followed her out and assisted her to a couch, from which she was then helped to a washroom, where she vomited again; that two doctors were called and they laid her out on a table, instructed her to breathe deeply, tried to get her to relax and gave her some hot water to drink; that she continued to vomit and had diarrhea and severe pains in her abdomen; that she was carried out of the City Hall on a stretcher, placed in a patrol car and taken to her home at 13310 Brandon avenue; that her mother put her to bed immediately and called their family physician who upon his arrival gave her a hypodermic injection; that the doctor came to her home again that evening, gave her another hypodermic injection and put her on a liquid diet; that she was kept on the liquid diet for ten days, during which period she was unable to eat any solid foods and remained in a very weakened condition; that she was unable to leave her bed for a week and her abdomen continued to be severely sensitive; that she returned to school ten days after the occurrence but was unable to give any piano lessons during the three weeks she was under her doctor's care; and that he visited her five times at home and she made four visits to his office. She further testified that on the morning of the day in question she had eaten her breakfast at home at 6:45 A.M.; that it consisted of fresh orange juice, cereal with cream, a fresh egg, some toast and a cup of coffee; and that she did not eat or drink anything from the time she had her breakfast until she had her lunch at defendant's drug store.

Virginia Maloney testified that she had eaten her breakfast at home about 7 A.M. on the morning of May 16, 1941 and that it consisted of fresh orange juice, cereal, milk and

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a cup of coffee; that she did not eat or drink anything from that time until she had her lunch at defendant's drug store; that she could not see the shrimps on top of the toast when the plate was set before her because they were covered with creamed sauce; that she ate only about half of her shrimps because she then noticed that they tasted "sort of funny;" and that they had a "peculiar taste" and seemed to be "sort of brown, tan color." As to her return to the lecture at the City Hall after lunch with Miss Sweany and the latter's illness and the nature of it, her testimony was substantially the same as Miss Sweany's.

Miss Maloney further testified that she accompanied Miss Sweany to her home in the patrol car; that she herself did not feel ill until she left the Sweany home later in the afternoon, when she became nauseated and had slight pains in her abdomen while going home on a street car; that the pains seemed to be a little worse after she arrived home; that she ate no supper; that there were services at her church that evening, which she attended because she was the organist; that shortly after 8 P.M. she became ill, broke out in cold perspiration and had severe pains in her abdomen; that her father, who was at the church services, drove her home in his automobile; that she vomited when she got home and went to bed; that her family physician was called and he prescribed some medicine which she took and he ordered her to bed; that she had pains continuously for three days and remained in bed from Friday to Sunday during which time she had only tea and liquids; that she stayed home from school for two weeks and that her pains continued but were not as strong as they were during the first two days; that when she returned to school her side still bothered her and she had a hard time getting up and down the stairs; that her doctor continued to treat her until school closed

about the middle of June; and that at the time of the trial her side still bothered her, if she walked very fast or ran up stairs.

Dr. John H. Keehan, who was Miss Maloney's attending physician, testified that when he examined her on May 16, 1941, she was in bed and had pain, nausea, vomiting and diarrhea; that he prescribed for her; and that over a period of two or three weeks she made five or six visits to his office because of a pain in her lower right side. The doctor was asked a hypothetical question which embraced every material fact and circumstance testified to by both plaintiffs. His direct examination then proceeded as follows:

"Q. Doctor, have you an opinion *** from a medical and surgical point of view, based upon a reasonable degree of medical certainty as to whether or not there might or could be a causal relationship between the condition of ill being that I related to you in the hypothetical question of these girls and the food that they ate for lunch, the shrimps?

"A. Yes, I do.

"Q. And what is that opinion, Doctor?

" ***

"A. My diagnosis would be/guess -

"Mr. Blatz: Pardon me, I don't mean to interrupt, but maybe the witness misunderstands. It is not his diagnosis. It is an opinion.

"THE COURT: Your opinion.

"A. Well, then my opinion would be a gastro-enteritis due to food poisoning.

"MR. MITGANG: Q. Doctor, will you give the reasons for your opinion?

"A. Well, here are two different girls living in different homes, both perfectly well up to that time, and both eating different food in the morning at seven. Then they both eat the same food for lunch and within a short period of time they both become ill with nausea and vomiting, so you would believe that that would be what would cause that."

Dr. Keehan testified on cross-examination that "gastro-enteritis means an inflammation of the lining of the stomach and bowel" and that when a person suffers from gastro-enteritis due to food it means that such person has been poisoned by food.

The only witness who testified in defendant's behalf was its dietician, Rose O'Donnell. She stated on direct examination that it was her duty to oversee the preparation of all food in the drug store of defendant where plaintiffs had their lunch; that the shrimps served there on May 16, 1941 were boiled for twenty minutes at a temperature of 210 and then shelled; that the mushrooms used on that day were fried in butter and added to the shrimps and the cream sauce was made of flour or starch and boiled milk; that she saw and inspected the shrimps before and after they were boiled; that she ate some of them during her inspection; that Mr. Hart, the manager, also inspected the shrimps; that the shrimps arrived at the store about 8 A.M., were placed in the icebox, were cooked about 10 A.M. and immediately prepared for serving; and that none of the food was ever kept outside of an ice box. She testified on cross-examination that from eight to ten gallons or about 125 pounds of shrimps were served on the day in question; that the shrimps averaged about 20 to the pound; that her inspection consisted of "seeing that they are properly cooked, that they are clean;" that ordinarily she would dip her hand "down into a container and slowly pull them up and try to look them over as slowly and clearly as possible;" that her inspection of the shrimps took about twenty minutes; that she would take a few shrimps out of each container and see how they looked and that if they appeared all right she would pass the rest of them; and that she had "too much food there to make a minute inspection of every piece of food."

Defendant first contends that "there was no proof adduced at the trial that the illness of the plaintiffs was due to the food eaten in defendant's store or to any impurities in the food" and that "the medical testimony on behalf of plaintiffs was based upon a mere guess, surmise or conjecture." It is then argued that "the verdicts of the jury are not only against the manifest weight

The only witness who testified in defendant's favor was the defendant himself. He testified that he was not present at the time of the shooting and that he did not know the person who shot the victim. He also testified that he did not see the victim being taken to the hospital. The State's case is based on the testimony of the victim's family and friends, who testified that they saw the victim being taken to the hospital and that they saw the defendant standing near the victim's car. The State also presented evidence that the defendant had a motive to kill the victim. The defendant's attorney argued that the defendant was not present at the time of the shooting and that he did not know the person who shot the victim. The jury found the defendant guilty of first-degree murder and sentenced him to life in prison.

of the evidence but there is no substantial evidence to sustain the verdicts and judgments for plaintiffs."

It is conceded that the law is well settled that one who sells food for immediate consumption impliedly warrants the wholesomeness of such food. Although defendant's counsel argues to the contrary, the evidence clearly shows without contradiction that plaintiffs suffered from food poisoning on the day in question. Therefore the only issue of fact for the jury to determine, in so far as defendant's liability was concerned, was whether or not the food plaintiffs had for lunch in Walgreen's drug store was the proximate cause of their poisoning.

Defendant asserts that Dr. Keehan's medical testimony was based on a mere guess and it predicates its assertion on the fact that at one point in his testimony, when the doctor was asked his opinion in answer to the hypothetical question propounded to him by plaintiffs' attorney, he began to answer by stating, "My diagnosis would be a guess --." When the doctor had proceeded that far with his answer, he was interrupted by defendant's attorney, who stated, "I don't mean to interrupt, but maybe the witness misunderstands. It is not his diagnosis. It is an opinion." It will be noted that upon the trial defendant's attorney merely endeavored to set the witness straight as to his testimony by advising him that the question required an answer as to his opinion rather than as to his diagnosis. No significance was attached to the doctor's use of the word "guess" by defendant's attorney upon the trial. The trial judge then told the witness to state his opinion, which he did and gave his reasons therefor, as heretofore set forth. The doctor clearly stated that in his opinion both plaintiffs had been poisoned by food and that "here are two different girls living in different homes, both perfectly well up to that time, and both eating different food in the morning at seven. Then

they both eat the same food for lunch and within a short period of time they both become ill with nausea and vomiting, so you would believe that that would be what would cause that." Defendant criticizes the doctor's statement "that that would be what would cause that" as being mere conjecture. While the witness' testimony in this regard was inaptly phrased, it can only be fairly construed as meaning that in his opinion based upon a reasonable degree of medical certainty there might or could have been a causal relationship between the food the girls ate at defendant's drug store and their subsequent illness. Defendant neither objected to the testimony of the doctor nor asked that it be stricken.

It is unnecessary to repeat plaintiffs' testimony except to point out a few of the significant facts and circumstances contained therein. These girls came from different homes. They both ate their breakfast about 7 A.M. They were in good health when they left home. They arrived at the City Hall about 8:30 A.M. and put in a busy morning visiting the various city departments with their class. They were in good health when they went to defendant's drug store for lunch about noon. They both ate the same lunch. Miss Sweany was a faster eater and ate all of her lunch. Miss Maloney, after eating half of her lunch, noticed that the shrimps had a peculiar taste and that those remaining on her plate were "sort of brown, tan color" and she ate no more of them. Miss Sweany, who ate her entire meal, became ill first, within a short time after she had finished her lunch. Miss Maloney, who ate only half her lunch, became ill several hours later. They both exhibited the same symptoms which were typical of food poisoning. From the time they had their breakfast neither of the girls ate or drank anything, except what they had for lunch at Walgreen's, until they became ill.

In our opinion, the facts and circumstances in evidence

established at least a prima facie case that plaintiffs' food poisoning resulted from the unwholesome quality of the food, which they were served and which they consumed in defendant's drug store, and it was for the jury to say whether such prima facie case was met or overcome by the evidence introduced on behalf of defendant. We think that the verdicts of the jury were justified by the evidence.

The amount of the damages awarded plaintiffs is not questioned and it is therefore unnecessary to consider or discuss the nature or extent of the injuries suffered by them as the result of their food poisoning.

Defendant also contends that "the court erred in giving the third instruction on behalf of the plaintiffs, for the reason that said instruction did not limit the jury to the particular acts or negligence alleged in the complaint; and the instruction did not limit the jury to the evidence as the basis for fixing the compensation to be awarded." The instruction complained of is as follows:

"The court instructs the jury that the law makes the seller of articles of food sold for immediate consumption a warrantor that the articles he sells for immediate consumption are wholesome, and free from all defects that may injure the health of the purchaser; and if from a preponderance of the evidence you find that the defendant sold to the plaintiffs food for immediate consumption that was diseased, or infected with anything unwholesome, and which rendered it unwholesome as food, and which could not be perceived by the plaintiffs, and that by reason of such defect the plaintiffs, from eating such food, were made ill, then the defendant is bound by law to compensate the plaintiffs for all of the direct and necessary damage they suffered by reason of eating the said food."

In Wiedeman v. Keller, 171 Ill. 93, it was held that the refusal of the trial court to give a practically identical instruction constituted reversible error. The foregoing instruction criticized in the instant case embraced the material allegations of the complaint, the degree of proof required to sustain same and, in our opinion, was a fair and complete statement of the law applicable to defendant's liability in this

established at least a small part of the
evidence which the defendant has
which has been shown to be true in
other cases, and it is not the only one
which has been shown to be true in
other cases. The result of the
evidence is that the defendant is not

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case. That plaintiffs were entitled to be compensated "for all of the direct and necessary damage they suffered by reason of eating the said food" if defendant was found guilty is a correct statement of the law. We find nothing in the instruction that could possibly have misled or prejudiced the jury.

The record is particularly free of error. A fair trial was had and we think substantial justice has been done between the parties.

The judgments of the Superior court of Cook county are affirmed.

JUDGMENTS AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

[illegible]

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1944

Term No. 44F6

Agenda No.1.

SIGNAL HILL OIL CORPORATION
OF ILLINOIS, a Corporation,

Plaintiff-Appellant

vs.

HAYNES-THOMAS DRILLING CORPO-
RATION, a corporation, CHARLES
BURKE, and MANLEY OIL CORPO-
RATION, a corporation,

Defendants,

HAYNES-THOMAS DRILLING CORPO-
RATION, a corporation, and
CHARLES BURKE,

Defendants-Appellees

323 I.A. 23

Appeal from
Circuit Court
Marion County

Honorable F.R.Dove,
Judge Presiding

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BRISTOW, J.

Appellant, Signal Hill Oil Corporation of Illinois, a corporation, filed its complaint for accounting against Haynes-Thomas Drilling Corporation, a corporation, and Charles Burke, Appellees, and Manley Oil Corporation, a corporation. A judgment in the amount of \$172.74 was rendered by the trial court against Appellees, and the trial court assessed one-half of the costs against plaintiff and one-half against defendants. From this judgment, Plaintiff-Appellant has appealed to this court.

George S. Anderson, J. C. Haynes, A. C. Thomas, and appellee Charles Burke in 1938, purchased an oil lease called Nathan Lee Lease for \$2300.00, which sum was advanced by Burke. Each then owned 1/4th of this lease. Having no money with which to develop this lease, they sold to one Charles Connelly a 1/2 interest in it for \$8,000.00. A short time thereafter, Burke



purchased from Connelly a 1/8th interest in the lease.

Anderson, Haynes and Thomas, each one owned a 1/8th interest, Burke a 1/4th interest, and Connelly a 3/8ths interest. Connelly's part was not to be liable for any operation expenses.

Anderson, Haynes, Thomas and Burke then purchased a drilling rig for \$3000.00 which was paid for out of the \$8,000.00. Thereafter, these four men caused to be incorporated Appellee, The Haynes-Thomas Drilling Corporation, a corporation, and each of the four then subscribed for 6250 shares of its stock, being all of the stock authorized, and each agreed to pay \$6250.00 for same. Anderson, Haynes and Thomas were elected officers of this corporation. The drilling rig was then turned over to the corporation, and later, with the knowledge and consent of all of these four incorporators, the balance of the \$8,000.00 was turned over to Haynes-Thomas Drilling Corporation which was used by it in drilling wells and in operating said lease as well as on another lease. Arrangement was made whereby the corporation was to drill and operate this Nathan Lee lease and another lease, and be reimbursed for expenses of drilling and operating the wells from proceeds of oil produced and sold. It was so reimbursed.

In October, 1938, Anderson and one G. W. Johnson organized the Signal Hill Oil Corporation of Illinois, a corporation, the present Appellant. One half of Appellant's stock was issued to and owned by G. W. Johnson and his wife, Georgia, and the other half to Katherine Anderson, wife of said George S. Anderson. Anderson was manager of Appellant, and transferred to Appellant his 1/8th interest in the Nathan Lee Lease, for capital stock in Appellant. On December 7, 1938, a written trust agreement was executed by Irma Connelly, A. C. Thomas, J. C. Haynes, Charles Burke, and Appellant, making Charles



Burke trustee. By its terms Burke was to operate, manage and develop said lease, to pay out of production costs and drilling expenses chargeable against said lease to be paid by the individual parties, and after such costs and charges had been paid, to distribute the balance among the parties in the fractional parts as owned by them. At and before that time, oil was being produced and sold from said lease by Haynes-Thomas Drilling Corporation.

A written "order" signed by Thomas, Haynes, Anderson and Appellant was executed March 14, 1939. It recited the execution of the trust agreement which was attached, and that Haynes and Anderson owed \$5835.86 each and Thomas owed \$5260.85 to Appellee Haynes-Thomas Drilling Corporation for its stock subscribed by them. It recited that the parties desired and directed the trustee to pay any sum collected for their benefit direct to Haynes-Thomas Drilling Corporation until said subscribed shares of stock of each party had been paid in full. The stock subscribed in the name of Anderson was in his name held as "nominee" of Appellant.

The trustee did apply the profits from oil thereafter produced upon the balance due on said unpaid stock subscription as directed.

April 11, 1939, Appellant sold to Burke its interest in this lease and another lease for a consideration of \$50,000.00 to be paid from future oil productions, which amount was later paid. At the same time this lease interest was sold by Appellant, the stock subscription of Anderson was also sold to Burke for a further consideration of \$5000.00 which was paid Appellant.

No part of the \$8000.00 above mentioned was credited upon payment of the balance of said stock subscriptions. The chief contention in this case is that the trial court erred in



not giving judgment for 1/4th of this \$8000.00 in favor of Appellant against Appellees.

April 12, 1939, Anderson, who also had been president of Haynes-Thomas Drilling Corporation since its organization, resigned. On April 24, 1939, following the suggestion of a report of an auditor running to April 1, 1939 that the \$8000.60 be designated as "paid in surplus," the directors of Haynes-Thomas Drilling Corporation by vote credited this \$8000.00 item on its books to a heading of "Paid in Surplus". There was testimony that Anderson saw this auditor's report and that a copy of it was given to Johnson, president of Appellant.

Appellant contends that when it sold its 1/8th interest in the Nathan Lee lease and in the other lease called Fred Lee lease, and its stock which was in the name of Anderson as its "nominee", that said sale did not extinguish any liability to it of Appellees for 1/4th of the \$8000.00. There is also testimony by the president of Appellant that he had never learned of this \$8000.00 item until evidence developed in this accounting suit. Appellant contends that Burke was negligent as a trustee in not applying 1/4th of this \$8000.00 item to the credit of Appellant on satisfaction of stock subscription as authorized in said "order." Appellees contend that Anderson was manager of Appellant; that his wife owned 1/2 of the stock; that the knowledge of Anderson was the knowledge of Appellant; and that Appellant's president, Johnson, received the same knowledge by a copy of the auditor's report.

Appellant cites and discusses at length Chap. 32 Sect. 157.2 (E) of the Illinois Revised Statutes which defines "paid in surplus". Giving consideration to the same, the \$8000.00 consisting of the purchase price of the drilling rig and balance in money was not "paid in surplus" under the legal definition.

Appellant argues that the auditor was in error in so designating it and that the Board of Directors of Haynes-Thomas Drilling Corporation also was in error in later designating it on its records and books as "paid in surplus."

We are of the opinion that it is immaterial what designation by the auditor may have been ascribed or how the \$8000.00 may have been carried on the books. This statute was enacted to protect creditors of a corporation, but no creditors are involved in this litigation. As far as the rights of the parties interested are concerned, no substantial difference is indicated except from the standpoint of bookkeeping or of a creditor as to whether the \$8000.00 was shown as an asset of the corporation or was removed from the assets as a bookkeeping process and appeared as capital. If it was carried as an asset of the corporation, the value of the capital stock was correspondingly increased, and a purchaser of that stock would enjoy a distribution of his proportionate share of the \$8000 whichever way it appeared on the corporation books.

Appellant, through Anderson who was one of its organizers, its general manager, husband of the owner of one half of its stock, and holder of this stock as its "nominee", knew all of the facts regarding the purchase of the rig and the transfer of it and the balance of the \$8000.00. Such knowledge was the knowledge of Appellant. *Home Savings Bank vs. Wheeler*, 74 Ill. App. 261, 271; *Hight vs. Farmers Grain Co.* 214 Ill.App. 195, 199; *Sherwin-Williams Co. vs. Watson*, 361 Ill. 598, 605; *Simmons vs. Roseland Security Co.*, 331 Ill. 563, 574.

Anderson as general manager of Appellant handled the negotiations of the sale of its interest in this lease and stock in Haynes-Thomas Drilling Corporation owned by Appellant, to Burke. When the conveyance documents were signed, executed and delivered, there were present in the attorney's office Anderson,



general manager of Appellant, and his wife, Johnson, president of Appellant, and his wife - all owners of stock and officers of Appellant. Appellant authorized Anderson to convey to Burke its stock subscription in Haynes-Thomas Drilling Corporation. He made assignment of same, and Appellant received \$5000.00 for it. We find no proof that any false representations were made to Appellant by Appellees. Before deciding to sell its stock, Appellant had the right to secure all information it desired concerning assets and liabilities of Haynes-Thomas Drilling Corporation, and had refusal been made, Appellant could have refused to sell the stock subscription standing in the name of its manager as its "nominee". Therefore, when the Signal Hill Oil Corporation sold out to Burke, it divested itself of all rights and claims against Haynes-Thomas Corporation or Burke. Possibly Anderson did have some sort of a claim against the Haynes-Thomas Corporation for \$2000. There was nothing, however, in writing evidencing his right to that sum, and therefore it would be considered in the nature of an "open account". This was never assigned to the Appellant and therefore, the Appellant here in this proceeding is not entitled to recover the same. The Master heard and saw the witnesses and heard the testimony. There was evidence fully justifying the judgment entered by the trial court. It is not against the manifest weight of the evidence, and should be affirmed.

Complaint is made that all costs should have been taxed against Appellees. Considering the fact that the record of 333 pages concerned for the most part, matters not necessary for determining the liability for the amount of oil in the line, the value of which said judgment in said amount was entered, we do not feel that all costs should have been assessed against

Appellees, but that the division by the trial court was proper. There was no error in assessing the costs.

The judgment of the trial court should be and the same is hereby affirmed.

JUDGMENT AFFIRMED.

Abstract

FILED

MAY 26 1944

David J. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

43012

ETHEL BARNES JONES,

Plaintiff - Appellee,

v.

HILLARY RAY JONES,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

323 I.A. 523

MR. PRESIDING JUSTICE HURKE DELIVERED THE OPINION OF THE COURT.

On May 14, 1937 Ethel Barnes Jones filed a complaint for separate maintenance in the Superior Court of Cook County against Hillary Ray Jones. She represented that she married defendant at Crown Point, Indiana on July 23, 1932; that they lived and cohabited together until March 17, 1937; that two children were born to them, Hillary, Jr., and Ethel, four and three years of age, respectively; that defendant, wholly regardless of his marriage covenants, on March 17, 1937 wilfully deserted and absented himself from her without any reasonable cause; and that he refused to contribute to their support. She prayed that the defendant be required to make suitable provision for the separate maintenance and support of herself and the children. Defendant was served personally with a summons and with a notice that on May 25, 1937 a motion would be made for an order "in accordance with the complaint". Plaintiff's attorney was Mr. William K. Hooks. On May 25, 1937 the court entered an order that defendant pay to the plaintiff for the support of their two minor children the sum of \$8.00 per week, on the 1st and 15th of each month, the first payment to be made June 1, 1937; that he pay \$50.00 for attorney's fees; and that he have permission to visit the children at reasonable hours, pending the further order of the court. This order bore on its face the notation: "O.K. - Brumfield & Lawrence, Attorneys for defendant". On July 13, 1937 plaintiff filed a verified petition showing that defendant had failed and refused to comply with the order and that there was then due the sum

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WILLIAM JAMES (JAMES)

WILLIAM JAMES - (JAMES)

WILLIAM JAMES

WILLIAM JAMES (JAMES) WILLIAM JAMES (JAMES)

On May 14, 1907, James (JAMES) WILLIAM JAMES (JAMES)

for separate maintenance in the amount of \$100.00 per month

WILLIAM JAMES (JAMES) WILLIAM JAMES (JAMES)

from point, Illinois on May 14, 1907; and the first and continuing

support until May 14, 1907; and the amount was paid to James

WILLIAM JAMES (JAMES) WILLIAM JAMES (JAMES)

that William JAMES (JAMES) WILLIAM JAMES (JAMES)

March 14, 1907, and the amount was paid to James

any reasonable amount; and that he should be allowed to have

support. The court was of the opinion that the amount of \$100.00

provision for the separate maintenance and support of James and

the children. William JAMES (JAMES) WILLIAM JAMES (JAMES)

with a notice that on May 14, 1907, and the amount was paid to

order in accordance with the provisions of the Illinois

Mr. William J. James, on May 14, 1907, and the amount was paid to

that defendant pay to the plaintiff for the support of their two

minor children the sum of \$100.00 per month, on the 14th day of

each month, the first payment to be made on May 14, 1907; and on May

\$100.00 for attorney's fees; and that he have possession of their

the children at reasonable times, subject to the order of the

court. This order was made on the 14th day of May, 1907, and the

attorneys for defendant, on May 14, 1907, and the amount was

filed a verified petition showing that defendant had filed and

returned in compliance with the order and that there was then and

of \$92.00, and asked for a rule on he should not be found guilty of contempt. Notice of the motion was given to Mr. Jerry Brumfield, defendant. The court entered a rule that defendant show he should not be adjudged in contempt for refusing to obey the order of the court. On January 11, 1940, pursuant to a petition filed by plaintiff, the court entered judgment for her and against defendant in the sum of \$1,032.00 and ordered that execution issue. This judgment was for the amount due under the order for support of the children. At that time defendant resided in Washington, D. C. The notice to defendant was signed by Mr. George W. Lawrence, attorney for plaintiff, and was addressed to and served on Mr. Jerry Brumfield, attorney for defendant. On November 17, 1943 plaintiff filed a petition stating that since the judgment of January 11, 1940 the further sum of \$1,600.00 had accrued, making the total amount due under the order for the support of the children \$2,632.00; that the defendant had departed the jurisdiction of Illinois; that he would shortly be in the jurisdiction attending the funeral of his sister, and she asked for a writ of ne exeat reipublica to restrain him from leaving the jurisdiction of the court until the further order of the court. Mr. Jerry M. Brumfield, as a notary public, administered the oath to plaintiff when she verified her petition for the writ of ne exeat reipublica. On November 17, 1943 the court ordered that a writ of ne exeat reipublica issue, and that plaintiff give bond in the sum of \$100.00 and defendant give bond in the sum of \$1,000.00. Under authority of the writ, the sheriff seized the defendant. On November 23, 1943 Mr. Euclid L. Tayler was substituted as attorney for plaintiff in place of Mr. William E. Hooks. On November 24, 1943 plaintiff filed her amended complaint for separate maintenance. On November 29, 1943 Mr. Aaron H. Payne entered his appearance as attorney for the defendant, and on November 30, 1943 he filed an answer denying the marriage and

at \$12.00, and asked for a writ of

he should not be liable for the same.

Notice of the action was given to the party named.

defendant. The court ordered a writ of habeas corpus.

he should not be liable for the same, and the court

of the court. On January 11, 1901, the court

decided, the court ordered the writ of habeas corpus.

in the sum of \$1,000.00 and ordered the writ of habeas corpus.

judgment was for the amount of the writ of habeas corpus.

defendant. It was also ordered that the writ of habeas corpus

be given to defendant and that the writ of habeas corpus

for plaintiff, and the writ of habeas corpus for defendant.

judgment for defendant. On January 11, 1901, the court

ordered the writ of habeas corpus for defendant and the writ of

plaintiff. The court ordered the writ of habeas corpus for

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ordered the writ of habeas corpus for defendant and the writ of

plaintiff. The court ordered the writ of habeas corpus for

defendant and the writ of habeas corpus for plaintiff.

all of the material allegations of the amended complaint. On December 3, 1943 plaintiff filed a petition for a rule to show cause why the defendant should not be punished for contempt for failure to comply with the order for support of the children, and on the same day the court found that there was then due under the order for temporary support of the children and for temporary attorney's fees the sum of \$2,762.00; that the defendant wilfully failed and refused to obey the order of the court and continued to so refuse; that he was guilty of wilful contempt and committed him to serve a term of not exceeding six months in the county jail. The case was heard by the court and on December 7, 1943 a decree was entered finding that the parties were married at Crown Point, Indiana on July 23, 1932; that two children were born to the parties, namely, Hillary, Jr., and Ethel, ten and nine years, respectively; and that on March 17, 1937 defendant deserted plaintiff without any reasonable cause or fault on her part. The decree allowed plaintiff the sum of \$10.00 per week for the support of the minor children of the parties; directed that defendant pay the plaintiff for her attorney's fees the sum of \$250.00; awarded her the care, custody and education of the children; directed that the writ of ne exeat republica, staying the defendant from departing from the jurisdiction of the court without leave, be continued in force; that plaintiff's bond, theretofore approved, stand, and that defendant be required to give bond with good and sufficient surety in the penal sum of \$4,000.00, conditioned as required by law. Defendant appeals from the order of December 3, 1943, committing him for contempt of court, from the orders directing the issuance of the writ of ne exeat republica, from the order of May 25, 1937, directing him to pay support money for the children, and from the decree of December 7, 1943.

The first point urged by defendant is that an order to pay alimony in a proceeding for separate maintenance must always be based upon a showing of ability to pay, and that there was no such showing.

The first point raised by the defense is that the government has failed to establish that the defendant was in the area of the crime on the night of the crime. The government has failed to establish that the defendant was in the area of the crime on the night of the crime. The government has failed to establish that the defendant was in the area of the crime on the night of the crime.

The order of May 25, 1937 required him to pay \$8.00 per week for the support of his two children. He does not deny that they are his children. He contends that he was not married to plaintiff. He testified that in 1937 he made \$90.00 a month and tips when working. He worked as a dining car waiter. We find that the support money the defendant was required to pay to his wife for the support and maintenance of his two children was reasonable, and that he was at all times able to pay this amount. The ten dollars a week which the final decree requires him to pay for the support and maintenance of his children is reasonable, and the evidence shows that he is well able to pay this amount, but that he wilfully neglects and refuses to do so.

The second point advanced by defendant is that it was necessary for plaintiff to prove by a preponderance of the evidence that she was married to the defendant. He states that the evidence shows that the cohabitation was meretricious in its inception; that such meretricious relationship will be presumed to continue; that the burden was on plaintiff to prove that the parties were validly married; that the records of marriage in a sister state must be duly authenticated and that an order for alimony cannot be entered unless the marriage is established. The parties are in agreement that on July 14, 1932 they drove to Crown Point, Indiana and procured a license to marry. Plaintiff testified that they returned to that State on July 23, 1932 and were married before a justice of the peace. Defendant, while admitting that the marriage license was procured, denies that they returned to Crown Point and were married. He testified that they were never married. Plaintiff introduced a certified copy of a marriage license, issued by the clerk of the Circuit Court of Lake County, Indiana on July 14, 1932, authorizing any person empowered by law to solemnize marriages, to marry Hillary Ray Jones and Ethel Barnes. Ethel Barnes was the maiden name of plaintiff. The return on this marriage license

The order of July 10, 1955, was issued in the case of the
support of his two children. It was not until after the
children. It was not until after the children. It was not until after the children.
testified that in 1955 he was in a state of mind to support his
he worked as a traveling salesman. He was not in a state of mind to support his
The defendant was required to pay to his wife the support and
disposition of his two children was reasonable. He was not in a state of mind to support his
all these things in his mind. He was not in a state of mind to support his
final order required him to pay to his wife the support and disposition of
his children in 1955. He was not in a state of mind to support his
this in his mind. He was not in a state of mind to support his

in so.

The record reflects that the defendant is now in a
necessary for plaintiff to show up a record of the defendant's
the was carried to the defendant. It was not until after the children.
that the defendant was working as a traveling salesman. He was not in a state of mind to support his
operational relationship will be shown in evidence that the defendant
was an attempt to show that the defendant was working as a traveling salesman. He was not in a state of mind to support his
the records of marriage in a state of mind to support his
and that in order for plaintiff to show that the defendant was working as a traveling salesman. He was not in a state of mind to support his
established. The records are in evidence that in July 14, 1955, the
leave to show that the defendant was working as a traveling salesman. He was not in a state of mind to support his
it is stated that they returned to their home in July 14, 1955, and
were carried before a Justice of the Peace. The records are in evidence that in July 14, 1955, the
that the marriage license was issued. It was not until after the children.
Grove Point and was married. It was not until after the children.
Grove Point. Plaintiff introduced a certified copy of a marriage license
issued by the clerk of the District Court of Lake County, Indiana on
July 14, 1955, authorized and signed by the clerk of the District Court
Grove Point, to marry William Lee Jones and Mary Jane Jones. The records are in evidence that in July 14, 1955, the
was the maiden name of plaintiff. The records are in evidence that in July 14, 1955, the

contains a certificate by "C. Columbus Harper", that he married the parties named in the license on July 23, 1932. Defendant introduced a photostatic copy of the certificate of marriage showing the handwriting of one "C. Columbus Harper". He also introduced a public record from Lake County, Indiana showing that the place of marriage was Chicago and that the marriage was performed by "C. Columbus Harper" on July 23, 1932. A clergyman by the name of C. Columbus Harper, who formerly was a pastor of a church on the south side of Chicago and who, at the time he testified, was a pastor of a church in Texas, stated that he did not marry the parties; that the return purporting to bear the signature of "C. Columbus Harper" was not his signature; and that he never performed a marriage in CrownPoint, Indiana. On January 15, 1933 Hillary, Jr. was born, and on March 11, 1934 Ethel was born. Defendant does not dispute the paternity of the children. The birth records designate defendant as the father. There was evidence that plaintiff and defendant cohabited as husband and wife until 1937, when he left, and that after the entry of the order for the support of the children he took up his residence in Washington, D. C., and later in the State of New York. After the separation the defendant never sent the plaintiff any money. Defendant had been married prior to his marriage to plaintiff. His first wife died. On January 9, 1940, while in Washington, D. C., he married Delilah Wright. He testified that this marriage was subsequently annulled because she had a husband from whom she was not divorced. A child was born to Mrs. Wright prior to defendant's marriage to her and this child was called Nathaniel Jones. On October 8, 1943 the defendant married Blanche Calloway at Wilmington, Delaware. The defendant returned to Chicago in November, 1943 to attend his sister's funeral, at which time he was apprehended on the writ of ne exeat republica. When plaintiff offered in evidence the marriage license

contains a certificate in "J. Edgar Hoover" that he received the parties named in the license on July 27, 1933. Subsequent investigation a photostatic copy of the certificate for records showing the date of issue of one "J. Edgar Hoover". He also furnished a similar record from Lake County, Illinois showing that the date of marriage was Chicago and that the marriage was performed by "J. Edgar Hoover" on July 27, 1933. A statement by the name of J. Edgar Hoover, who formerly was a partner of a firm on the south side of Chicago and who, at the time of marriage, was a partner of a firm in Texas, stated that he did not marry the parties; that the person reporting to bear the signature of "J. Edgar Hoover" was not his signature; and that he never performed a marriage in Illinois. On January 12, 1934, at Chicago, Ill., the same, and on March 11, 1934 that was born. Defendant does not dispute the validity of the children. The birth records (which are on file in the State of Illinois) show evidence that plaintiff and defendant claimed as parents and wife until 1937, when he left, and that after the birth of the other for the support of the children he took up his residence in Washington, D. C., and later in the State of New York. After the separation the defendant never lost the custody and money. Defendant had been married prior to his marriage to plaintiff. His first wife died. On January 2, 1930, while in Washington, D. C., he married plaintiff. He testified that this marriage was consummated, annulled because she had a husband from whom she was not divorced, a child was born to her. Plaintiff prior to defendant's marriage to her and this child was called "Margaret Jones". In January 2, 1934 the defendant married plaintiff. Defendant, however, returned to Chicago to defendant, 1935 to return his wife's funeral, at which time he was accompanied by the wife of Dr. Jones. Defendant offered in evidence the marriage license

and return thereon, there was only a general objection. An objection must be specific, or it is ineffective. The court did not err in admitting this exhibit.

Both parties are in agreement that the marriage was not performed by the Rev. C. Columbus Harper, who testified. While in the east defendant wrote plaintiff a letter addressed in endearing terms, in which he calls her his "wife" his "dear wife" and his "dear little wife". Defendant was present at the time the support order was entered on May 25, 1937. Plaintiff testified that he told her he would not obey the order. By his subsequent conduct he carried this threat into effect. He went east and made no attempt to support his wife or children. He fled the jurisdiction of the court. The court was fully justified in issuing the writ of ne exeat republica and in requiring him to give a substantial bond. The chancellor had an opportunity to see and hear the witnesses. There was competent evidence to support the finding of the court that there was a valid marriage. This man has no regard for the sanctity of the marriage relation. He married plaintiff and abandoned her, leaving her to support their two children. He then married Delilah Wright, a married woman, and was the father of a child by her. He states that this marriage was annulled because she was married and undivorced. A short time previous to coming to Chicago to attend his sister's funeral, he married Blanche Calloway. From this record it is manifest that the chancellor was right in committing the defendant to the county jail for contempt of court, in entering the decree for separate maintenance and in continuing in effect the writ of ne exeat republica.

Defendant points out that the original complaint was filed in behalf of plaintiff by attorney William K. Hooks and that at the time the order of May 25, 1937 was entered, he was represented by Messrs. Brumfield and Lawrence; that the motion preceding the order of July 13, 1937, being the first rule to show cause, was preceded by a notice to Jerry Brumfield; that the attorney who represented plaintiff

in her motion for the judgment which was entered on January 11, 1940, was Mr. George W. Lawrence; that Mr. Lawrence is the same person who was a member of the firm of Brunfield and Lawrence; and that the petition for the writ of ne exeat filed on November 17, 1943 was sworn to before Mr. Jerry Brunfield. While the actions of these attorneys are somewhat irregular, it does not appear that defendant's rights were in any way prejudiced. The orders entered against him were moderate. There was a full hearing on the case prior to the entry of the decree and he was represented by a competent attorney of his own choosing, who had not been in the case theretofore. The attorneys about whom he complains are the attorneys of his selection. Apparently, they sought to protect his interests.

The orders of May 25, 1937 and December 3, 1943 and the decree of December 7, 1943 are affirmed.

ORDERS AND DECREE AFFIRMED.

KILEY AND LUPE, JJ. CONCUR.

in her action for the judgment which was entered on January 11, 1934,
was Mr. George A. Lawrence; that Mr. Lawrence is the man known as
was a member of the firm of Lawrence and Lawrence; and that the
petition for the writ of habeas corpus was filed on November 27, 1934
was to deliver Mr. Lawrence. While the action was pending
attorneys for Lawrence appeared, it does not appear that Lawrence's
rights were in any way prejudiced. The court entered judgment and
was satisfied. There was a full hearing on the case and in the entry
of the decree and he was represented by a competent attorney at all
own appeal, who had not been in the case previously. The attorney
about whom he complained was the attorney of Mr. Lawrence, and
that court is proven his innocence.

The decree of May 25, 1934 was reversed, 1934 and 1935

decree of January 7, 1934 was affirmed.

Witness my hand and seal of office.

THOMAS M. LEE, Jr., Clerk.

42645

STANLEY R. PIERCE,

Appellant,

v.

CHARLES E. CASTLE and FRANCIS TYLER PIERCE,
individually and as Executor of the
Estate of Lucy Pierce Castle, deceased,
et al.,

Defendants.

FRANCIS TYLER PIERCE, individually and as
Executor of the Estate of Lucy Pierce
Castle, deceased.

Appellee.

323 I.A. 524

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery action seeking a determination of plaintiff's rights arising out of an alleged oral contract; to impress a constructive trust upon property bequeathed to certain defendants; and for an accounting.

On motions the court struck the original, the first and second amended complaints and plaintiff stood by the latter pleading and has appealed. The question is whether, taken as true, the allegations well pleaded, in the second amended complaint, state a cause of action.

Plaintiff alleges that under the will of George W. Pierce, he, as executor, distributed the estate among the sole heirs in the following proportion: Bertha Pierce, widow of George W. Pierce, one-third; F. T. Pierce, son, one-third; Lucy Pierce Castle, daughter, one-sixth, to plaintiff, son, one-sixth and to George C. Pierce and Alexander W. Pierce, grandchildren one-twelfth each; that a Chicago leasehold was shared in the same proportion; and that in addition Bertha Pierce was paid \$50,898.85; plaintiff, Lucy Pierce Castle and F. T. Pierce were paid \$25,490.88 each, and the grandchildren \$12,745.40 each. Plaintiff further alleges that thereafter Bertha

Pierce died, bequeathing Lucy Castle and F. T. Pierce \$5,000 each; the grandchildren \$1,000 each and to plaintiff her 1/3 leasehold interest and residual estate, and naming him executor; that thereafter Lucy Castle and the defendants F. T. and George C. and Alexander W. Pierce filed a suit to contest the will of Bertha Pierce against plaintiff and others; that plaintiff by paying them \$25,000 in addition to their legacies, compromised the suit which was dismissed and "bought" one-fourth of the money and all their interest in the leasehold distributed to them under the estates of George W. and Bertha Pierce, subject to the life estate of each therein; and that the transaction was consummated by plaintiff making payment, and receipt thereof by the sellers. He further alleges that thereafter Lucy Castle died and plaintiff became entitled to the one-fourth interest he purchased, but that in her will she bequeathed to F. T. Pierce her leasehold interest and to George C. and Alexander W. \$1,000 each; and that they well knew plaintiff's rights and have refused to account and are constructive trustees for his benefit to the extent of one-fourth of each bequest.

F. T. Pierce, individually and as executor of Lucy Castle's will, moved to strike the pleading on the grounds that the alleged agreement to buy, violated the Statute of Frauds because it was not in writing; that though plaintiff was executor of the Estates of Bertha and George W. Pierce, he did not specify what property Lucy Castle received from their estates other than the leasehold interest; and that plaintiff's action is barred by reason of section 204 of the Probate Court Act of 1939 (Sec. 356, Chap. 3, Ill. Rev. Stats. 1941). No attack was made by plaintiff on the motion.

An analysis of the pleading shows there is no allegation that the money received by defendants as bequests from Lucy Castle, is money she received from her mother or father, or that there was not sufficient assets in her estate other than the bequests from

1. The above information is confidential and should be handled accordingly.

Estimated 17% and 11% increase in 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

-100- paid about \$1600 to 2000 for two or three half acres

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Subject is the life story of one person; and that for comparison.

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the subject. No further action was necessary but could be

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CONFIDENTIAL

... ..

Y. Yamaoka, T. Tanabe, K. Tanabe, K. Tanabe, K. Tanabe

100-443887-1000

THE LAR OF THE HOUSE OF COMMONS

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1992-1993

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Wolfgang von dem Bussche, Universität Bonn

that the word "referred" is interpreted as "referred to" (see 10-11).

See entry 1.2.2.2.1, subject to review and development and value of

(continued from page 6)

which plaintiff's alleged claim could be paid. We believe, therefore, there is no case stated against defendants George C. and Alexander W. Pierce. The parties agree that the leasehold interest bequeathed by Lucy Castle to F. T. Castle is personal property. It is also an "interest in" land covered by section 2 of the Statute of Frauds. Chicago Attachment Co. v. Davis, et al, 142 Ill. 172. Since plaintiff relies upon an oral contract for the purchase of a leasehold, he was required to allege facts which would exempt the contract from the statute and, in this equitable action, to show the basis for exemption by alleging facts from which it would appear that he had so far performed the contract that its repudiation would be a fraud upon him. Gladville v. McDole, 247 Ill. 34; Nelson v. Nelson, 334 Ill. 43; Ropacki v. Ropacki, 354 Ill. 502. His only allegation tending to make that showing is his payment of the \$25,000 and that is not enough to remove the contract from the operation of the statute since an action at law would lie for the recovery of the payment. Temple v. Johnson, 71 Ill. 13; Gladville v. McDole, 247 Ill. 34; Browne on Statute of Frauds, 4th Ed. Sec. 433, p. 534. We need not consider the other points raised. The second complaint was insufficient and was properly stricken.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

42666

LA GROSSE MANUFACTURING COMPANY,
a corporation,

Plaintiff - Appellee,

v.

MAX A. SPRINGER and LENA M. SPRINGER,

Defendants - Appellants.

323 I.A. 25

APPEAL FROM

SUPERIOR COURT

COUNTY COURT.

65

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action in chancery to discover assets of the Chicago Wood Products, Inc., to be applied in satisfaction of plaintiff's judgment. The action was dismissed as to Paul Springer and the decree, upon a report of a Master in Chancery was for plaintiff and against Max and Lena Springer, his wife, jointly and severally for \$2,181.76 together with master's fees and costs. Defendants have appealed.

Chicago Wood Products, Inc. was organized in 1925, with Max and Lena Springer and Warner H. Wall, directors, and until its dissolution in 1935, Max Springer was President, Wall, Vice President and Lena Springer, Secretary and Treasurer, with all the stock owned by the Springers. Its business was manufacturing and wholesaling wood products and until 1935 was located at 2508-29 Cermak Road, Chicago, Ill. Plaintiff recovered a judgment February 20, 1934 against the Corporation in the Municipal Court of Chicago for \$1,451.15 and costs amounting to \$5.40. Execution issued February 23 and June 22, 1934, and \$8.10 was collected by plaintiff on the judgment. No further collections have been made. Max Springer testified in the proceedings which led to the judgment. The Corporation's checking account was opened at the Lawndale State Bank July 17, 1933, with a deposit of \$2,001.56. November 20, 1933 an account was opened in the same Bank

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1964, and 1970 was estimated by the following equation:

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under the name of Paul Springer, doing business as Chicago Wood Products, 2525 West Cermak Road, with authority to either Paul or Max Springer to sign checks. The first deposit in the latter account, November 18, 1933, was the sum of \$4,519.05, represented by a check drawn against the Corporation account November 18, 1933. December 30, 1933, the Corporation's balance was \$2.97. It was kept alive to May 1, 1934 and, although close to \$15,000 was deposited therein from day to day, the deposits were immediately withdrawn by checks then deposited in the Paul Springer account and the Bank was authorized and directed to charge against the latter account, certain checks otherwise chargeable to the Corporation. Paul Springer, son of Max, was 9 years of age when the account in his name was opened and when he was described as the sole owner of the Chicago Wood Products. The Bank, upon discovering his age, caused the closing of the account on May 5, 1934. The balance in that account of \$1,892.66 was then deposited in a new account in the name of Chicago Wood By-Products, with authority to Max Springer and his Secretary, Alexander, to sign checks. This account was open from May 5 to December 31, 1934 and was extremely active, having an average balance of about \$1,900. January 12, 1935, Alexander wrote the Bank that he had transferred his rights and interest in the Chicago Wood By-Products to Lena Springer as sole owner of the business. The same day she made an affidavit that she was the sole owner and that she alone would be authorized to sign checks drawn against the Wood By-Products account and that her business was located at 2509 W. Cermak Rd., Chicago. Testimony before the master, a stipulation of the parties and exhibits establish these facts found by the decree.

In their pleading and at the trial defendants sought to establish that the moneys withdrawn from the corporate account, as well as their appropriation of accounts receivable, goodwill, books, records, furniture, furnishings and equipment, were to apply upon indebtedness

owing to them by the Corporation. They say here that if they were entitled to the withdrawals we should not be influenced by the manipulations of the accounts. In their answer these debts were stated to be \$3,200 salary and expenses to Max; and \$3,000 salary as secretary and stenographer to Lena. Under the circumstances they had the burden of showing justification for the withdrawals. His testimony was that he applied what money was in the Bank against back salary and loans amounting to \$11,866.89. He claimed that the books and records of the Corporation were given away and were not available to support his claim. At the trial Corporate income tax statements for 1931-32 were received by the master, subject to plaintiff's objection, and the record does not show that the objection was ruled upon. The objection must be considered as overruled. Rule 58, Sec. 6, Superior Ct. These statements include liabilities, debts, due Max Springer \$5,234.05, 1931 and \$5,926.69, 1932. There was no competent reliable evidence produced by defendant to maintain their burden. The court properly found that there was no proof to support the contentions that at the time the withdrawal and appropriation was made the Corporation owed the defendants the debts claimed; and that the various accounts, deposits and withdrawals formed a deliberate and fraudulent attempt on the part of Max and Lena Springer, pursuant to their conspiracy, to defraud and deceive plaintiff and prevent its collecting the judgment.

Defendants contend that since the money was withdrawn prior to judgment, and no allegation made that they knew of the suit, there can be no finding of fraud or charge to support it. The record does not show when suit was commenced or when the cause of action arose. It is clear, however, that the original withdrawal of the \$4,519.05 was made from the corporate account and was wrongful since, so far as the record shows, neither defendant was entitled to the moneys. The complaint charges a fraudulent scheme to cheat and defraud plaintiff and prevent its collecting the judgment, and it specifically

sets out some details of the scheme. We think that the allegations were sufficient to accommodate the proof and the proof sufficient to sustain the decree. Defendants state in their brief that the sole issue is whether Springer had the right to withdraw the money November 18, 1933. We decide that issue by affirming the finding of the chancellor that no such right was proven. Since he was not entitled to the withdrawal, the fact that it preceded the judgment is not important. The device employed by defendants in their attempt to prevent plaintiff from collecting its judgment is a usual form of fraud. Meridian Amusement Co. v. Home Theatre Co., 215 Ill. App. 479. The moneys withdrawn were part of the capital stock of the corporation. Central Illinois Service Company v. Wartz, 284 Ill. 102; constituted Trust Funds for the payment of the corporate debts; and in the hands of stockholders are subject to the claims of creditors of the corporation. Singer v. Hutchinson, 183 Ill. 606; Henry v. Jewett, 94 Ill. App. 667; 19 C. J. S. Sec. 1380; and Fletcher's Cyclopaedia, Corporations, Vol. 15a, Sec. 7407.

These considerations dispose of the questions whether defendants had preference over plaintiff because of salaries due or were entitled to share prorata, and there is nothing in the record to show that there are other creditors entitled to share with plaintiff.

This suit does not come within the two year limitation of Sec. 94, Corporation Act, (Chap. 38, Sec. 94, Ill. Rev. Stats.) for the judgment here was obtained before the Corporation was dissolved and this proceeding was against the defendants, fraudulent transferees of corporate assets before dissolution.

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

42988

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOSEPH CAMPIONE,

Plaintiff in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

323 I.A. 525

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This case is here on a writ of error to review the judgment finding Campione guilty of violation of the election laws "as charged". The trial was by the court without a jury and Campione was sentenced to six months in the County Jail. His motion for probation was denied.

The trial was on the second amended criminal information which charged that the twenty-two defendants, including Campione, "did wilfully, knowingly and unlawfully, make, write and prepare certain false and fraudulent sheets and portions of sheets and falsify various sheets and portions of sheets of the nominating petition of John R. Philp for his nomination by the Republican Party for Probate Judge of Cook County." Following the specific charges against the other defendants, it was charged that Campione did wilfully, knowingly and unlawfully notarize sheets 1 to 100 and 140 to 150 inclusive, "when in truth and in fact * * * he knew at the time" the signatures of the purported circulators had been forged to the affidavits on the sheets, and that the purported circulators did not appear before him and swear to the signatures. Defendants Jurgens, Cusimano, Murphy, Bonafede, Comerford, Gauna, and Barrica, who died prior to the trial, are charged with forging signatures of purported circulators to the affidavits of sheets notarized by Campione. The information also charged generally that Campione wilfully, falsely and fraudulently affixed his name as

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IN SENATE

COMMITTEE ON

INTERNAL SECURITY

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notary and his seal to the designated sheets of the nominating petition and made and prepared the jurat on the sheets, knowing that none of the purported circulators mentioned in the sheets ever appeared before him or was given the oath by him or signed the affidavit on the sheets, and that he wilfully, knowingly, fraudulently and unlawfully made, wrote and prepared the affidavit portion of the designated sheets, all in violation of section 77 of the primary law. The court "believing that the greatest offender here is Joseph Campione", fined all other defendants, except Garrica, \$100, the maximum fine provided in Section 77 (Ill. Rev. Stats. 1941, Chap. 46, Par. 441). That section [now 29-32], known as the "catch all provision" provides that "any person who shall commit any act prohibited, or refrain from doing any act required, etc."

Pursuant to the charge in the information the State was required to prove that Campione wrote his name and affixed his seal as notary, knowing that the signatures of the persons whose names were signed to the affidavits as circulators had been forged, and that the persons whose oaths he was taking, were not the persons whose signatures appeared as circulators.

The case was decided upon a stipulation of the testimony, and exhibits. The stipulation was limited by defendant's statement that they were not admitting guilt. The State's case pursuant to the stipulation showed the receipt/ of the petitions by the County Clerk; that the signatures of the purported circulators on sheets 1 to 100 and 140 to 150, inclusive, were forgeries; that the handwriting of defendants Jurgens, Gerace, Epstein, Cusimano, Kerens, Brown, Riordan, McCormick, Romano, Seery, Bonafede, Tisdale, Comerford, Pufahl, Flosi, Campione, Scardina and Montforti on certain exhibits were genuine; and that those named were in 1942 employed in various public offices of Cook County and the City of Chicago and were members and political workers in the 42nd Ward Regular Democratic

The first was a letter from the President of the United States, dated February 7, 1948, to the Secretary of the Navy, in which he requested that the Navy Department be kept advised of the progress of the investigation of the activities of the Japanese in the United States. The letter was signed by the President and the Secretary of the Navy.

Organization; that the forged sheets were part of 800 ordered by Philp, February 5, 1942 and delivered about 5 P.M. the same day; that Jurgens, Gusimano, Bonafede, Comerford, Gauna and Barrica in addition to other unlawful contributions to the fraudulent petition, forged the names of the purported circulators to sheets of the petition notarized by Campione; that Campione wrote his own signature as notary in the jurats at the bottom of sheets 1 to 100 and 140 to 150, both inclusive; that Investigator McLaughlin of the Chicago Board of Election Commissioners, in addition to hearing defendant Scardina make an admission as to forgeries in connection with the petition, heard Jurgens admit forging the names of the purported circulators upon the sheets, subject of the charge against him, notarized by Campione; and that Police Officer Lavlak heard Campione in the presence of Assistant State's Attorney Kinnally, Special Attorney Cashion, and Deputy County Clerk Bolan admit taking "the acknowledgment" of the circulators of sheets 1 to 100 and 140 to 150 on the dates written in "the acknowledgment" in the Subway Billiard Parlor at 1136 North Clark Street, and that each of the circulators whose names were written appeared personally before him and acknowledged their signatures.

The only testimony offered on behalf of the defendant, who objected to the competency and relevancy of the stipulation outlined hereinabove, was of his good character.

It is apparent that only the sheets notarized by Campione are involved in the precise question of his fraudulent conduct, though the State apparently relies upon the rest of the stipulation proving forgeries and fraud against other defendants upon other sheets to show the general complete fraud as tending to implicate Campione therein and show his guilty knowledge. While it is charged he prepared the jurats and parts of the affidavits, the only writing proved to be Campione's is that of his signature as notary in the

jurats. There are admissions by Scardina, Jurgens and Comerford, but only the admission of Jurgens bears directly on the charge against Campione.

Campione contends, among other things, that the proof does not show that he committed a crime. He refers to his alleged admission that each of the circulators on sheets 1 to 100 and 140 to 150 appeared personally before him and took oath; that the signature affixed, as circulator, was that of each person. The affidavit and jurat are as follows:

"STATE OF ILLINOIS,)
COUNTY OF COOK.) ss.

I
(Insert name of person circulating this petition
and making the affidavit)

do hereby certify that I am upwards of the age of 21 years, that I reside at No., in the County of Cook and State of Illinois, and that the signatures on this sheet were signed in my presence and are genuine, and that to the best of my knowledge and belief the persons so signing were at the time of signing said petition qualified voters of the Republican party in the County of Cook and State of Illinois, and that their respective residence addresses are correctly stated as above set forth.

(This line for signature of person circulating this petition and making this affidavit)

Subscribed and sworn to before me, a
this day of in the County of Cook and State of Illinois,
(Seal) A. D. 1942.

(Signature of Person Administering Oath)"

It is plain, despite the Campione admission of taking "acknowledgments", that those who appeared before him swore to the statements in the affidavit, and that Campione did not acknowledge, as a notary does in the usual acknowledgments of legal instruments, that they were personally known by him to be the same persons whose names were subscribed to the affidavits.

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NOT CORRELATE WITH POLITICAL MATTERS OR ANYTHING OF THAT SORT

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The State points out that the dates written in the jurat on the sheets involved in the charge against Campione ranged from January 27, 1942 to February 5, 1942, and we are mindful of the stipulation that these sheets were not delivered until the evening of February 5th. Campione argues that on the evidence he could have been absolutely innocent, or may have made an innocent mistake, or that some of the persons presenting themselves requested a change in date and that this practice was not uncommon among lawyers. The State says he is not charged with carelessness, but with corruption and that the forgeries and the false dates are "mighty strong facts and circumstances over which one cannot fail to draw the inference" that Campione had guilty knowledge, especially where there is no denial. Campione argues that the proof fails to show that he knew that the signatures of the purported circulators were false. In answer the State points to the uncontradicted proof of the facts that the signatures of the purported circulators were forgeries; of Campione's admission that he took the "acknowledgments"; of the discrepancies in the dates in the jurats, and proof of his signature; and of proof that Jurgens, Cusimano, Donafede, Comerford, Gauna and Barrica forged the signatures of the purported circulators. It then refers us to inferences which can be drawn from the evidence that all the defendants were members of the same political organization, and holding jobs in public offices in the City and County. It argues that these combined facts and inferences show a confederation and conspiracy, and that defendant used his public official seal and position to give the fraudulent petition sufficient legal form for its filing and thereby completed the crime. It further argues that all the defendants were tried jointly, and the acts of each and the facts and circumstances connected therewith establish a conspiracy to prepare the fraudulent petition. It finally says the law will presume from the evidence that Campione knew that some of its co-defendants forged the names of the purported circulators and knew that the object of all defendants' acts was the preparation and filing of the false petition.

The first section of the report is the summary of the case. It states that the case is a criminal case, and that the defendant is charged with the crime of murder. The summary also states that the defendant is a white male, and that the victim is a black female. The summary also states that the case is being heard in the District Court of the District of Columbia.

The second section of the report is the statement of the facts. It states that the defendant was seen on the night of the murder, and that he was seen with the victim. It also states that the defendant was seen with a gun, and that he was seen firing the gun. The statement of the facts also states that the defendant was seen running away from the scene of the murder.

The third section of the report is the statement of the law. It states that the law requires the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime. It also states that the law requires the prosecution to prove that the defendant was the one who fired the shot that killed the victim.

The fourth section of the report is the statement of the evidence. It states that the evidence consists of the testimony of the witnesses, the testimony of the defendant, and the physical evidence. It also states that the evidence is being presented to the jury.

The fifth section of the report is the statement of the conclusions. It states that the jury has found the defendant guilty of the crime of murder. It also states that the jury has recommended that the defendant be sentenced to death.

The sixth section of the report is the statement of the recommendations. It states that the recommendation is that the defendant be sentenced to death. It also states that the recommendation is based on the evidence presented to the jury.

The seventh section of the report is the statement of the dissent. It states that the dissent is based on the fact that the evidence is not sufficient to prove beyond a reasonable doubt that the defendant is guilty of the crime. It also states that the dissent is based on the fact that the evidence is not sufficient to prove that the defendant was the one who fired the shot that killed the victim.

The eighth section of the report is the statement of the majority opinion. It states that the majority opinion is that the defendant is guilty of the crime of murder. It also states that the majority opinion is based on the evidence presented to the jury.

The ninth section of the report is the statement of the dissenting opinion. It states that the dissenting opinion is that the defendant is not guilty of the crime of murder. It also states that the dissenting opinion is based on the fact that the evidence is not sufficient to prove beyond a reasonable doubt that the defendant is guilty of the crime.

The tenth section of the report is the statement of the final decision. It states that the final decision is that the defendant is guilty of the crime of murder. It also states that the final decision is based on the evidence presented to the jury.

This is a criminal case not a contempt proceeding.

Campione must be presumed innocent until every element of the charge laid against him has been proven beyond a reasonable doubt. Reference to the charges hereinbefore, plainly shows that an essential element to be so proven is his alleged guilty knowledge of the forgeries of the signatures of the purported circulators and the consequent falsity of the oaths administered. He is charged with knowing that the persons whose names were signed as circulators never appeared before him and never signed their names in his presence and, therefore, that those who appeared and signed were forgers. This is the nub of the case, for if Campione did not know the persons who appeared before him, or did not know the persons whose names were signed as purported circulators, then, the charge cannot be sustained. Without a showing of his guilty knowledge beyond a reasonable doubt, the presumption of Campione's innocence prevails and requires that the reasonable inferences be drawn in his favor.

The jurat reads, "Subscribed and sworn to before me * * *." The record shows that Campione notarized 110 sheets. His admission is that he notarized them at 1136 North Clark Street, while the place of Jurgens' forgeries is set by the latter's admission, at 745 North State St. While ~~xx~~ Campione's admission was that he took "acknowledgments," it is evident from what we have said ~~xx~~ that ^{actually} no acknowledgments were taken. There are contradictions arising from his admission that he took "acknowledgments" on the dates stated in "the acknowledgments" and dates written in the jurats. We have pointed out that there is no evidence that he filled out the jurats. There is no claim that Campione knew the purported circulators. There is no evidence that Jurgens, Cusimano, Murphy, Bonafede, Comerford, Gaunz and Barrica knew Campione, or that he knew them or that he knew of the forgeries.

The stipulation is silent on these points. None of the admissions in any way connect up Campione with, or supply that proof. Jurgens, for instance, by admitting his forgeries, in no way infers that Campione knew him at the time or knew of the forgeries, nor is there any direct proof that Jurgens or any other defendants appeared before Campione to swear to the forged signatures.

If in view of these considerations and the whole proof, reasonable inferences of Campione's innocence can consistently be drawn, the judgment against him must be reversed for lack of proof of the essential element of guilty knowledge. That element determines whether Campione is guilty of a crime or of carelessness. Thus the question whether he knew Jurgens, and the others connected with the sheets he notarized, is the vital element. The State says this element is proven by the fact of his co-membership with them in the Ward Organization. This is not one of several circumstances offered as the basis for the inference - it is the only circumstance. From that circumstance we are asked by the State to presume the vital element.

It is not denied that after the State refused to stipulate to Campione's good character, it was furnished with a list of the proposed character witnesses and that the case was, thereupon, continued for three days before those witnesses testified. Their unimpeached testimony proved his character and reputation as a law abiding citizen of the community. Considering the entire proof and the circumstance relied upon by the State, for proof of Campione's guilty knowledge, in the light of the character evidence and giving him his due legal protection as a defendant in a criminal case, the inference that he did not know Jurgens, Gusimano, Murphy, Bonafede, Comerford, Gaune and Barrica, may as consistently be drawn as the inference that he knew them. We hold therefore that there is a failure of proof of the essential element of Campione's guilty knowledge. We believe that to hold otherwise would require utter

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disregard of fundamental American principles of law. The judgment is, accordingly, reversed.

JUDGMENT REVERSED.

BURKE, P.J. AND LUTT, J. CONCUR.

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MAX RITTENBERG,

Appellant,

v.

FRANK J. MURNIGHAN, HARRY W. SOLOWON,
FRANK LYNN, individually and as Trustees
of Trust Agreement of Sheridan-Argyle
Hotel Company and as directors of
Sheridan-Argyle Hotel Company, a corpora-
tion, SHERIDAN-ARGYLE HOTEL COMPANY, a
corporation, and GABRIEL E. GOLDBERG,

Appellees.

323 I.A. 526

APPEAL FROM THE

SUPREME COURT

OF COOK COUNTY.

67

MR. JUSTICE LUPC DELIVERED THE OPINION OF THE COURT.

The plaintiff, Max Rittenberg, is one of the holders of a trust certificate evidencing the deposit of fifteen shares of common stock of the Sheridan-Argyle Hotel Company. The company was incorporated pursuant to the provisions of a plan of reorganization approved in proceedings filed in the United States District Court under section 77-B of the amended Bankruptcy Act, and subsequent to its incorporation and in pursuance of the plan of reorganization the property involved herein known as the Copeland Hotel (now Somerset Hotel) was conveyed to the company.

The plan of reorganization further provided that persons holding and owning bonds secured by a trust deed upon said premises should receive trust certificates which represented shares of stock of the hotel company and which shares of stock were to be held and owned by the trustees under the terms of the trust agreement dated June 21, 1937, for the use and benefit of persons to whom such trust certificates were issued. By the terms of the trust agreement the certificate holders could withdraw from the trust at any time and upon surrender of their trust certificates obtain stock of the hotel company in the amount set up in the trust certificates surrendered. The said trust agreement further provided that during the continuance

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THESE ARE THE RESULTS OF THE INVESTIGATION CONDUCTED BY THE BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, IN CONNECTION WITH THE LOSS OF THE STEAMSHIP "ALBANY" ON APRIL 15, 1917, WHICH WAS DESTROYED BY A SUBMARINE.

THE RESULTS OF THE INVESTIGATION CONDUCTED BY THE BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, IN CONNECTION WITH THE LOSS OF THE STEAMSHIP "ALBANY" ON APRIL 15, 1917, WHICH WAS DESTROYED BY A SUBMARINE, ARE AS FOLLOWS:

THE LOSS OF THE STEAMSHIP "ALBANY" ON APRIL 15, 1917, WAS THE RESULT OF THE ACTION OF A SUBMARINE. THE INVESTIGATION CONDUCTED BY THE BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, HAS RESULTED IN THE FOLLOWING CONCLUSIONS:

of the trust the trustees should have the full legal title to all the capital stock held by them under the terms of the trust agreement; that they had the power to exercise all rights of absolute owners of the capital stock of the corporation held by them, including the right to vote thereon and to take part in and consent to any corporate or shareholders action of any kind whatsoever; that the holders of the trust certificates should not have any right in respect of any stock held by the trustees to take part in or consent to or in any way control or limit any corporate or shareholders' action in the hotel company; that the trustees might vote for election of trustees or directors of the corporation; and that the action or proceeding which the trustees were authorized to act upon included the leasing of all or any part of the property of the hotel company.

Said trust agreement by its terms will expire on June 31, 1947. The agreement contains a provision that the same may be terminated at the end of each two-year period after its date upon the vote of a majority at a referendum or meeting of the certificate holders. Out of the 7275 outstanding shares of the hotel company stock, the trustees held 5863 shares thereof. The defendants Frank J. Murnighan, Harry W. Solomon, and Frank Lynn were designated as trustees under said trust agreement and entered upon their duties on July 2, 1937. On July 12, 1937, being the first meeting of the shareholders, the defendants elected themselves as directors, and as such, at a following meeting elected themselves officers of said hotel company. They have been re-elected at each succeeding annual meeting and have remained as the only directors and officers of said company up to the present time. Defendants managed said hotel company until January 1, 1941, when the defendant George E. Goldberg took possession and management of the same, under the terms of a ten-year net lease, which is the subject of controversy in this proceeding.

[illegible]

Plaintiff filed his complaint in equity as the holder of a trust certificate and in his complaint requested the court decree as follows: (a) that the trust agreement was repugnant to and prohibited by section 3 of article II of the Illinois constitution, and therefore void; (b) that said trust agreement was contrary to public policy and, therefore, void; (c) that the statutory requirements for affirmative vote to make a lease not in the usual course of business were mandatory, and failure to comply therewith rendered the lease void; (d) that the lease for ten years was beyond the probable duration of the trust and that the trustees had no power to execute a lease beyond such probable duration and, therefore, it should be declared void; and, (e) that the trustees were guilty of misconduct in the management of the property and in making the lease without soliciting other bids and without communicating with the bidders in order to obtain higher bids, and therefore should be held liable for such damages as were caused by such misconduct.

A hearing was had before the chancellor in open court and evidence was taken. A final decree was entered dismissing the complaint for want of equity.

Plaintiff, claiming a constitutional question was involved, perfected an appeal directed to the Supreme Court, and that court in its opinion (Rittenberg v. Murnighan, 381 Ill. 267) transferred the cause to this court. In its opinion the court cited Babeock v. Chicago Railways Company, 325 Ill. 16, and after quoting from said case and distinguishing Luthy v. Reed, 270 Ill. 170, upon which plaintiff relies to support his conclusion that the trust agreement is repugnant to the constitution and contrary to public policy, the court said (p. 275): "We feel that the constitutional question raised by appellant has been fully decided adversely to his contention in Babeock v. Chicago Railways Company, supra." The opinion of the Supreme Court is conclusive of the contentions raised by plaintiff.

[illegible]

that the trust agreement is repugnant to the constitution and contrary to public policy.

The contention was raised by plaintiff that the statutory requirements for affirmative vote to make a lease not in the usual course of business were mandatory and failure to comply therewith rendered the ten-year net lease to defendant Goldberg void. Although the Supreme Court in this case did not specifically pass upon that question, it did, during the course of its opinion state as follows:

"The shares of stock in the trust were issued to the trustees upon the formation of the corporation and the beneficiaries have never had title, ownership, or possession of the shares." (p. 273.)

"In the present case the holders of the trust certificates never were shareholders of the corporation, and therefore there was no separation of the voting power from the ownership of the shares." (pp. 274-275.)

"Here the trust agreement provides that the trustees shall have an interest in the capital stock and that during the trust period the power of the trustees to act thereunder is irrevocable." (p. 275.)

On an examination of section 1 of article III of the trust agreement we find the following provisions: "The right of the trustees to vote shall include the right to vote for election of directors and subject to restrictions hereinafter provided, in favor of or in opposition to any resolution or proposed action of any character whatsoever which may be presented at any meeting or require the consent of shareholders of the corporation * * *. Without by enumeration limiting such general rights it is understood that said action or proceeding may include the mortgaging or pledging or selling or leasing of all or any part of the property of the corporation."

It is further provided by said trust agreement that the trustees shall not vote for the sale or mortgaging of all or a major portion of the property and assets of the corporation unless the terms of sale or mortgage shall be given to the registered holders of certificates not less than fifteen days prior to the meeting at

TABLE 1. *Summary of the results of the 1998 survey of the 100 most common species of fish in the Great Lakes.*

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is stable. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$ if the matrix A is not stable. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is not stable and the matrix B is positive definite.

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(20) *unmarked* is a 31-year-old woman, who is a graduate of the University of Illinois at Chicago.

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which it is proposed to vote thereon, nor should any sale or mortgage be authorized if prior to the date of said meeting the holders of 33-1/3 per cent or more of the aggregate number of shares of the capital stock of the corporation represented by the trust certificates then outstanding should in writing advise the trustees of their objection and dissent thereto."

We find from an examination of the terms of the trust agreement that the limitation imposed relates solely to the sale or mortgaging of all or a major portion of the property and assets of the corporation. There is no limitation or restriction imposed upon the trustees as to leasing all or any part of the property of the corporation. The power to lease is definitely conferred without any limitation or restriction as is imposed in case of sale or mortgage.

Had the plaintiff been a stockholder of the corporation he might claim and exercise a derivative right of action through the corporation. Alexander v. Quality Leather Goods Corporation, 269 N. Y. Supp. 499. In the case of Curtiss v. Wilmarth, 254 Mich. 242, the court said at page 252:

"In a stockholders' suit they do not sue in their own right but in that of the corporation. The cause of action is an asset of the corporation."

In this case, therefore, plaintiff, if a stockholder, would have had to take the position that he was suing in a derivative action for the benefit of the corporation. Plaintiff, not being a stockholder, could not exercise the right of suing in a derivative action for and on behalf of the corporation. Plaintiff therefore must claim solely under the provisions of the trust agreement. When his claim is scrutinized from that reasoning he virtually says that his agents (the trustees under the trust agreement) exercised the right and power of leasing conferred upon the trustees, but that the exercise of this power was performed in an informal and improper or unlawful manner.

The trustees owned more than two-thirds of the outstanding shares of the corporation's stock at the time of making the lease to Goldberg. On November 27, 1940, at a meeting held and attended by all the trustees, a resolution was unanimously adopted authorizing the board and its officers to execute the lease in question. On December 31, 1940, the trustees voted in favor of said lease and authorized its execution. From November 1, 1940 to December 31, 1940, on which date the Goldberg lease was signed, the trustees held 5363 shares of capital stock under the terms of the trust agreement; 1412 shares was held by other shareholders. Could there be any question that the trustees were in a position to call a stockholders' meeting and vote the shares held by them in favor of the execution of a lease, when the outstanding 1412 were not sufficient in amount to defeat any resolution proposed by the trustees as shareholders to authorize said lease? We think not.

The record shows that Goldberg had entered into possession under the terms of the lease at the time of the hearing before the chancellor in January, 1942, at which time Goldberg had already expended more than \$41,000 in rehabilitating the hotel. Under these circumstances we are constrained to hold that this lease cannot be held to be void on the ground that no formal stockholders' meeting was held to authorize the making of said lease, and it is doubtful if the informality complained of could be taken advantage of in a derivative suit, especially since no actual stockholder has taken any action up to the present time. The passage of time infers acquiescence and ratification both on the part of stockholders and the corporation. However, the plaintiff is in no position to raise the question of this informality, because he is not a stockholder of the corporation, and he has no right to institute a derivative action on behalf of the corporation without being a stockholder, and he cannot complain with reference to the manner in which the trustees caused the leasing of the property as long as the trustees were authorized under the trust agreement to cause such a lease to be made by the corporation.

Plaintiff next contends that the lease for ten years is beyond the probable duration of the trust and that the trustees had no power to execute a lease beyond such probable duration and said lease should be declared void.

We have already held in effect that said lease cannot be set aside by the corporation. The lease was made by the corporation and not by the trustees. The trustees merely voted for the making of the lease. The plaintiff is in no better position to urge that the lease by the corporation be set aside because it is for ten years than he is to urge that the lease was void because not voted for at a meeting of the stockholders of the corporation. The point thus made by plaintiff must be taken from the position that the trustees had no authority to vote for a ten-year lease and in so doing acted in a manner detrimental to the interest of the certificate holders. The only claim of the plaintiff under this phase of the case would be for damages against the trustees for acting in an unreasonable manner and not for the best interests of the certificate holders. We must, therefore, consider this claim with plaintiff's last contention that the trustees were guilty of misconduct in the management of the property and in making said lease.

Pertaining to the question of the handling of the property and the making of the lease in question, the Supreme Court had set forth the facts (pp. 269, 271):

"The trustees managed the hotel from 1937 to 1941. The property was in extreme need of rehabilitation, not having been rehabilitated in six or seven years. Accumulated taxes and penalties, at the time the trustees took over, amounted to \$140,123.84. The trustees' first year of operation showed an increase of \$16,000 over the last year of Federal court trusteeship, and in the second year was \$23,000 over the last year of the Federal court trusteeship's management. In 1940 revenue began to drop, apparently due to the poor physical condition of the property.

Prior to the fall of 1940 the trustees at several times considered leasing the entire property but had decided against this measure. During this time the hotel consisted mainly of apartments

which were rented out on a year-to-year basis. During the fall of 1940, because of the apparent drop in revenue, the trustees decided to lease the entire property to a tenant who would extensively rehabilitate the hotel. Other hotels in the district had been receiving extensive rehabilitations, making it necessary in order to compete with these hotels that the Copeland (Somerset) hotel likewise be rehabilitated.

On the trial the plaintiff stipulated that it was to the best interest of the corporation and shareholders and the holders of the trust certificates that a lease of the hotel property be executed on December 31, 1940. On November 6, 1940, the trustees adopted a resolution authorizing the solicitation of bids to lease the hotel property, providing in the resolution that all bids were to be submitted not later than November 27. It so happened that defendant George E. Goldberg submitted a bid on the property, which bid was dated October 21, 1940 and was made after the trustees had already had two general discussions relative to the advisability of leasing the property. Only four bids were received, all of which were discussed on November 27, 1940. The highest and best bid was that of George E. Goldberg for a rental term of ten years at \$36,000 per year minimum, with an additional rental of 33-1/3 per cent of the gross in excess of \$128,000 a year, and 40 per cent in excess of \$140,000, attaching thereto a deposit of \$10,000 and agreeing to a rehabilitation program satisfactory to the officers of the company and the bidder. The testimony showed that Goldberg was an able, experienced and successful hotel operator, which was admitted by the plaintiff. The trustees obtained two credit reports on him and also examined the property he operated.

"Resolutions were adopted, accepting the Goldberg offer and authorizing the board of directors and officers to execute a lease with him on behalf of the corporation. Meetings were had from November 27 to December 26 as often as three times or more a week. The lease was drafted and redrafted and on the morning of December 26 each of the directors received a letter through the mail from a lawyer named Maxwell Rubin, submitting an offer on behalf of Joseph Stein for a lease of the hotel for ten years at a minimum of \$40,000 per year. Stein's offer offered a \$10,000 deposit which was not accompanied with the offer, and also offered \$62,000 for rehabilitation, of which \$12,000 was to be expended in the first year. The evidence showed that one of the trustees had had experience with Stein in the operation of the Pine Lodge Hotel, which was far from satisfactory and that the trustees discussed the Stein offer, coming to the conclusion that the Goldberg offer was a more satisfactory offer and that if they dropped the Goldberg lease, which was almost completely perfected, and considered the Stein lease further, that the trustees possibly would end up without any lease at all, it being desired that a tenant be had by January 1, 1941. The trustees also determined that Goldberg was a better operator than Stein and that the additional percentage in the Goldberg offer was more desirable than the lesser percentage in the Stein offer.

"On December 31, 1940, at a meeting duly called, the board of directors adopted a resolution authorizing the president and secretary of the company to execute a lease with Goldberg upon the terms submitted and providing that the lessee expend the aggregate sum of not less than \$51,000 for rehabilitation during the entire term and that \$10,000 be deposited to secure the faithful performance of the lease. The lease was on the same day approved and by the parties executed. Goldberg went into possession January 1, 1941. On February 11, 1941, the directors and trustees mailed a letter to all of the trust-certificate holders and shareholders advising them of the execution of the lease and the terms thereof."

which were tested out on a small-scale basis. During the 1940s, members of the movement for a new system of education were active in a number of ways. Some of the most important of these were the establishment of the National Council on Education, the National Education Association, and the National Teachers Association. These organizations were all founded in the 1940s and have since played a major role in the development of the American education system.

On the whole, the American education system has been in the past largely of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s.

During the 1940s, the American education system was largely of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s. The system of the 1940s was a system of the type of the system of the 1940s.

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The Supreme Court also stated in its opinion (at pp. 271, 272):

"At the time of the hearing in the superior court in January, 1942, a year after the execution of the lease, Goldberg had already spent more than \$41,000 in rehabilitating the hotel. His rent was paid to date and it was apparent that a percentage rental would accrue to the corporation, possibly in the amount of \$5,000, making a total rental received by the corporation for the year 1941 of approximately \$41,000. The proof also showed that during this period the hotel had reached a peak occupancy of approximately 95 to 97 per cent. Under the lease Goldberg was obligated to expend only \$18,000 the first year for rehabilitation. Under the terms of the lease it was not possible to apply the excess of the amount expended in lieu of rehabilitation for any other year. Shortly after the execution of the lease, the trustees appropriated \$4500 to themselves as salary which, however, the trustees allege was approved by a meeting of the shareholders and certificate holders long prior to the execution of the lease. This money was paid to the trustees from the general corporation account into which the \$10,000 deposit by Goldberg, as security for the performance of his lease, was placed.

"At the hearing in the court below, the plaintiff did not present any evidence as to the facts involved other than calling one of the trustees, under section 60 of the Practice Act. The defendants submitted in their proof the testimony of the three trustees and Goldberg, together with four real-estate and hotel men to substantiate that the rental of \$35,000 was a fair rental for the premises and more than an appraisal made by some of them."

It was stipulated by the plaintiff and the evidence shows that it was for the best interest of the corporation and its shareholders and the holders of trust certificates that a lease of the hotel property be executed on December 31, 1940. Such being the case, we are of the opinion that the trustees acted prudently in making the lease in question and that they acted in the best interest of the corporation and its shareholders and holders of the trust certificates in making the ten-year lease.

We further find that the plaintiff has failed in his proof to substantiate the charges of misconduct made against the defendants and that the defendant trustees are in no way liable to the plaintiff with reference to the management of the hotel property and in making the lease in question.

The decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

42827

H. SIMON, tr/a PUBLIC ELECTRIC
CONSTRUCTION COMPANY,

Respondent, Appellee,

v.

ALBERT J. MORAN, Bailiff of the
Municipal Court of Chicago,
CALUMET COAL COMPANY, a corporation,

Defendants.

On Petition for Leave to Appeal of
CALUMET COAL COMPANY,

Petitioner, Appellant.

323 I.A. 527

PETITION FOR LEAVE TO

APPEAL FROM ORDER

OF MUNICIPAL COURT

OF CHICAGO GRANTING

A NEW TRIAL.

68

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This was a trial of right of property action filed by H. Simon trading as Public Electric Construction Company, against Albert J. Moran, Bailiff of the Municipal Court of Chicago, and Calumet Coal Company, a corporation.

The statement of claim alleges, inter alia, that the plaintiff was the owner of certain personal property, and upon the trial of said cause without a jury the court entered a finding and judgment for the defendant. Thereafter, on motion of the plaintiff, the court granted a new trial, from which order the defendant Calumet Coal Company appealed.

Petitioner entered into a written lease with Bill Rand Sport Enterprises, leasing to it a coal yard located on the south side of Chicago, which coal yard was to be converted into a baseball park. The lessee after taking possession did certain remodeling and installed certain electrical equipment, poles, grandstands, etc. Bill Rand Sport Enterprises entered into a contract with the respondent herein for the installation of said material, labor, etc., upon which there was a balance of \$2809.69 due at the time of the

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1. *Journal of Management Education* 25(1): 10-20

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3. 结论

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Approved: _____, Secretary

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THE UNIVERSITY OF CHICAGO

JAMES EARL RAY

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Worth mentioning, according to the FBI, the following:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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institution of this suit. The contract reserved the title in respondent until said amount had been fully paid. On April 7, 1943, petitioner obtained a judgment in the Municipal Court of forcible entry and detainer against Bill Rand Sport Enterprises, Inc., which had abandoned the property, the fixtures and equipment thereon. Said petitioner took possession thereof in pursuance to the provisions of said lease. On April 22, 1943, petitioner obtained a judgment for the sum of \$728.57 against said Bill Rand Sport Enterprises. An execution was issued in pursuance of said judgment and a levy was made upon the property in question. Thereafter this suit was instituted by respondent who claimed a part of said property which had been seized by the Sheriff of the Municipal Court.

Petitioner herein in seeking reversal of the order of the trial court argues (a) that the trial court erred because it had no jurisdiction to grant a new trial; (b) that the motion was not made in apt time; and (c) that the order granting a new trial was an abuse of discretion.

Chapter 110, Section 68 (1), Ill. Rev. Stat. 1941, provides as follows:

"It shall be sufficient for the jury to pronounce their verdict by their foreman in open court, without reducing the same to writing if it is a general verdict, and the court shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment, or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within such ten days, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court. The time for appeal from such judgment shall not begin to run until the court shall rule upon the motion."

Section 68 clearly shows that a motion for new trial must be made within ten days after the entry of a final judgment or within such time as the court may allow on motion made within such ten days (and requires the filing in writing of the points specifying the ground of such motion) when said cause is tried by a jury. The cause now before us having been tried by the court without a jury, a motion

for new trial was not required and could serve no purpose whatever in preserving questions for review. Keith v. Arnold & Co., 254 Ill. App. 115; Glimax Tag Co. v. American Tag Co., 234 Ill. 179; Trout, et al. v. City of Herrin, 245 Ill. App. 348.

Counsel for petitioner rely upon the case of Schachtel v. Chicago Drug Corner, 290 Ill. App. 610. That was an appeal by the Chicago Drug Corner from an order of the Superior Court granting plaintiff a new trial. The court directed a verdict in favor of the defendant at the close of plaintiff's case, and judgment entered thereon. The sole question presented for determination was, "Did the trial court have jurisdiction to enter an order setting aside the judgment and granting plaintiff a new trial?" The court said:

"It appears from the record that the motion upon which the court's order was predicated was not made until January 22, 1957, which was thirty-two days after the entry of the judgment. At that time the trial court had lost jurisdiction of the case. Terms of court were abolished by the Civil Practice Act, and a period of thirty days after rendition of the judgment was substituted for the term of court as the period during which the court retained jurisdiction. * * * Accordingly, the trial court lacked jurisdiction to enter an order granting a new trial, predicated on a motion made more than thirty days after the judgment was rendered."

The Schachtel case was tried by jury and decided on the question of jurisdiction of the trial court to enter an order after term time, and therefore not in point. In the present case the motion for a new trial having been made within thirty days was in apt time, as said cause was tried by the court without a jury.

Courts of record have inherent power to vacate or set aside their judgments or orders during the term at which the same were rendered. Department of Public Works v. Legg, 374 Ill. 306. Section 83 of Chapter 77, Illinois Revised Statutes (1941) provides:

"Any such judgment, decree or order may be hereafter modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days whenever under the law heretofore in force it might have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term."

It therefore necessarily follows that the trial court had jurisdiction to vacate the judgment and to grant a new trial, said orders having been entered within thirty days from the rendition of

said judgment.

Counsel next contend that the granting of a new trial was an abuse of discretion. A court of review will not interfere with an order granting a new trial based on disputes as to the facts unless the record shows a clear abuse of discretion. Lenkowski v. Laukemper, 317 Ill. App. 304; Parke v. Lopez, 306 Ill. App. 426; Lefford v. Beardon, 303 Ill. App. 300; Tone v. Halsey, Stuart & Co. Inc., 286 Ill. App. 169. However, the correctness of a ruling on a question of law will be determined on appeal, independently of the judgment of the trial court. 5 C. J. S., sec. 1620; Pandall v. Pandall, 281 Ill. App. 169.

The only issue to be determined in the trial of right of property proceeding is who is entitled to the personal property there in question. Evidence was admitted which was irrelevant, incompetent and immaterial, which went to the question of whether or not the personal property became a part of the realty. This evidence was incompetent, as Chap. 37, Sec. 404, Ill. R. S. (1943) provides in substance that the trial of right of property shall be had only as to the personal property levied upon.

After a full and complete reading of the record in this case and the points raised, this court is of the opinion that no showing has been made that the trial court abused its discretion in granting a new trial, as the record shows there were disputed questions of fact. We therefore hold that the trial court did not err in sustaining the motion of respondent to vacate the order entered on May 21, 1943, and that the petitioner has failed to show an abuse of discretion. The order entered July 13, 1943 nunc pro tunc as of June 30, 1943, granting the motion of plaintiff for a new trial, is affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

42901

BERNICE PAUL, V. I. CHRENSTEIN
and SOPHIE GAPHIS,

Appellees,

v.

JOSEPH D. STEWART,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

323 I.A. 527

MR. JUSTICE LUKE DELIVERED THE OPINION OF THE COURT.

By a decree of the Superior Court the plaintiff, Bernice Paul, was awarded a mechanic's lien upon certain premises for the sum of \$883.07, and it was ordered that unless the co-defendant, Joseph D. Stewart, paid said sum together with \$250.00 on account of master's fees, within 5 days, said real estate be sold. This decree was entered on May 21, 1943, and on June 14, 1943, Bernice Paul executed a satisfaction of the amount due under said decree, which satisfaction was filed in the office of the Clerk of said Superior Court on June 17, 1943. In this satisfaction she stated on oath that at the time of executing said satisfaction she was still the owner of said decretal indebtedness.

On July 6, 1943, V. I. Chrenstein, one of her attorneys, filed a petition alleging that Bernice Paul had assigned all her right, title and interest in the subject matter of said mechanic's lien proceeding to some person or persons unknown to him, and that the defendant had knowledge of such fact, so that Bernice Paul was not the real owner of said decretal indebtedness at the time that she executed the satisfaction; that the obtaining of the satisfaction from Bernice Paul by the defendant, Stewart, without full payment of the decreed indebtedness, court costs and master's fees and the fees of her attorneys was a fraud upon the court; and therefore the satisfaction was null and void and of no effect.

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3231A.327

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the District of Columbia, this 1st day of February, 1904.

BY A. J. [Signature]

Attest: [Signature]

CLERK OF THE DISTRICT OF COLUMBIA

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AND OFFICE OF THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA WASHINGTON, D. C.

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To this petition the defendant, Stewart, filed an answer in which he alleged that he had no notice of any alleged assignment, and that no assignment of said decree of May 21, 1943, had been filed of record; that the defendant, Stewart, had recovered a judgment for \$75.00 for costs in a former appeal in this cause, against Bernice Paul, and that the satisfaction of that judgment was the consideration for the satisfaction of the decretal indebtedness of June 21, 1943; that he did not intend to avoid paying the fees of the master in chancery assessed against him, and had on July 6, 1943, offered the master a cashier's check for the sum of \$250.00 in payment thereof, which offer the master refused to accept. To this answer Ohrenstein filed his reply.

The master upon the instructions of Ohrenstein proceeded with a sale of the premises, disregarding the notice of Stewart's attorneys that the decretal indebtedness had been satisfied. Ohrenstein became the purchaser at the sale for the sum of \$900.00, and on July 14, 1943, the master filed his report of sale with the court, in which he stated that he had advertised the premises in question for sale on July 6, 1943; and that before he offered the property for sale he was tendered \$250.00 in payment of that portion of the master's fees taxed against the defendant, Stewart, which he refused to accept. Sophie Gaphis filed a petition with the Clerk of the Superior Court on July 29, 1943, in which she alleged that she was the owner by assignment dated December 27, 1939, from Bernice Paul of all rights of the latter in the mechanic's lien proceeding, and was entitled to the benefit of the decree entered on May 21, 1943. A copy of the purported assignment was attached to and made a part of the petition. The petition further alleged that on June 14, 1943, when Bernice Paul executed the satisfaction, she (Bernice Paul) had no interest in said decree, and that petitioner was the real owner of the decretal indebtedness. Petitioner prayed that the satisfaction of judgment filed in the Clerk's office on June 17, 1943, be set aside and vacated and that the master's report of sale be approved.

110

and that the subject's power of mind is impaired.

Filed in the Clerk's Office on June 10, 1944, by the Clerk and Attorney.

Indorsement. Witness signed with the signature of Attorney.

also stated, and that defendant was the sole owner of the property.

requested the indictment, the defendant being in custody.

The petition further alleged that on June 10, 1944, when the defendant

was arrested and removed to the station in and from which he was released.

The benefit of the doubt was given to the defendant, and he was released.

at the latter in the morning's late afternoon, and was released in

assignment during January 27, 1944, from which time he was released.

In July 27, 1944, in which the defendant was released and was released.

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three years against the defendant, which, when he was released from

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for him on July 7, 1944; and that he was released from the station on

which he stated that he had surrendered the property in custody.

July 14, 1944, the action filed with him in the station on July 14,

increased the amount of the sale for the sum of \$500.00, and on

average that the defendant had been released from the station.

with a sale of the property, the defendant had been released from the station.

The matter upon the defendant is completely resolved.

Upon a hearing before the chancellor no witnesses were sworn and no proofs were offered, except that Chrenstein read to the chancellor the petition of Sophie Gapsis, and counsel for Stewart requested leave of the court to file an answer thereto, which motion was denied. Statements were made to the court by Chrenstein in behalf of his own petition, the attorneys for Stewart made their statements in reply, and the court on July 30, 1943, entered an order that the allegations of the petition of Chrenstein were in all respects sustained; that the satisfaction piece filed be held as void and of no effect and stricken from the files, and that the master's report of sale be approved and confirmed. This appeal by Stewart from that order duly followed.

A review of the pleadings filed herein and the proceedings had before the court lead us to the view that the order of July 30, 1943, should not have been entered. Chrenstein, who was the attorney for Bernice Paul, was not a party to the suit and had no standing before the court to present an issue with reference to the setting aside of the satisfaction piece filed with the clerk. A plaintiff or counter-claimant can at any stage of a legal proceeding discharge his attorney and has the right to have the proceedings dismissed without regard to the fees of the attorney representing him. (Cameron v. Reener, 200 Ill. 64.) The subject matter of the litigation is the property of the plaintiff or counter-claimant, and either can dispose of it in any way that she sees fit. The attorney for such party must rely upon such remedies as may be afforded him under the lien law, but the attorney cannot control the litigation in opposition to the direction of his client.

We have not considered the acrimonious statements of counsel respecting each other since, even if true, they do not in any manner affect the final determination of the question before this court.

It is evident to us that the chancellor considered the petition of Sophie Gapsis in entering the order appealed from, but it should not have been considered until the defendant, Stewart, had an

From a reading of the Commission on Education report
and the report of the Commission on the
Education of the People of the United States, it is
evident that the Commission on the Education of the
People of the United States, which was created by the
Executive Order of the President, has been very
successful in its work. It has been able to
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people of the United States.

opportunity to answer and be heard concerning the merits of the petition. If the petition of Sophie Gapshis is true, then she was the actual owner of the decree of May 21, 1943, and Bernice Paul had no right to execute and deliver to Stewart a satisfaction of the decretal indebtedness then owned by said Sophie Gapshis.

Sophie Gapshis had a right to file her petition in these proceedings alleging that she was the actual owner of the decretal indebtedness through assignment from Bernice Paul; that Stewart had full knowledge of the rights of Sophie Gapshis, as the owner of said decretal indebtedness, prior to the execution of said satisfaction; that the act of defendant, Stewart, in procuring a satisfaction of said decretal indebtedness with knowledge of the rights of Sophie Gapshis was, therefore, fraudulent and void as to her; praying that said satisfaction be expunged from the files of said cause, and that a sale be held to enforce said decree of which she was the actual owner.

However, the chancellor erroneously acted upon the petition of Ohrenstein who was not a party to said proceedings, and thus prevented a hearing upon the petition of said Sophie Gapshis.

The defendant, Stewart, is entitled to answer the petition of said Sophie Gapshis, and to a hearing upon the merits thereof. The chancellor should have denied the petition of Ohrenstein, granted leave to Stewart to answer the petition of Sophie Gapshis and proceeded to a hearing upon the petition of Sophie Gapshis, and any answer and any reply thereto that might have been filed herein. The views here expressed are without prejudice to any rights Attorneys Victor I. Ohrenstein and Walter C. Wellman, or either of them may have to file and prosecute a claim against any person by virtue of the Attorney's Lien Act.

The order of July 30, 1943 is, therefore, reversed and the cause remanded with directions to deny the petition of Ohrenstein;

[illegible]

to vacate the order approving the master's report of sale; to grant leave to Sophie Gephis to file her petition in this cause; to grant leave to the defendant, Stewart, or any other parties in interest to answer such petition or any amended petition that may be filed herein; that a hearing be had upon such petition and any answers that may be filed thereto; and for such other proceedings as may not be inconsistent with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.

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323 Ill. App.
Adm. Ct. 710-7

Abstract

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Gen. No. 9810

Agenda No. 22

IN THE
APPELLATE COURT OF THE
STATE OF ILLINOIS
SECOND DISTRICT
MAY TERM A. D. 1944

323 I.A. 537

1393

Elmer J. Humbert, as Administrator
of the Estate of John Elmer Humbert,
Deceased,

Appellee,

v.

Frank O. Lowden, James E. Gorman
and Joseph B. Fleming, Trustees of
the Chicago, Rock Island and Pacific
Railway Company, a Corporation, and
the Chicago, Rock Island and Pacific
Railway Company, a Corporation,
Appellants.

Appeal from

Circuit Court of

Henry County.

Per Curiam:

Appellee recovered a judgment for \$4800.00 against appellants in the circuit court of Henry County in a street crossing accident case. This court upon an appeal, arrived at the conclusion that appellee's intestate was guilty of contributory negligence which was the proximate cause of his death and without discussing the other grounds urged for a reversal of the judgment, reversed that judgment without remanding. (Humbert Admr. v. Lowden et al, 317 Ill. App. 538.

The judgment of this court was subsequently reversed by the Supreme Court which held that under the particular facts shown by the evidence the question whether the deceased was guilty of such contributory negligence as to bar a recovery was a question of fact for the jury and the cause was remanded to this

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court with directions to consider the other errors assigned by appellants. (Humbert, Admr. v. Lowden, et al. 385 Ill. 437.)

The principal other error relied upon for reversal which is argued by appellants is that the verdict of the jury is contrary to the greater weight of the evidence and that therefore the trial court erred in denying the motion of appellants for a new trial. In the opinion of the Supreme Court it was pointed out that the only proper inquiry on the question before it was whether there was any evidence which taken with its intendment most favorable to the plaintiff, tended to prove the charges in the complaint. On a motion for a new trial, however, the court may weigh the evidence for the purpose of determining whether the verdict is contrary to the manifest weight of the evidence, and if the court so finds, a new trial should be granted.

(Hunt v. Vermillion County Children's Home, 381 Ill. 29;

Belden v. Innis, 84 Ill. 78; Boyle v. Levings, 24 Ill. 223.)

The accident occurred at the State Street crossing of appellants' tracks in the business district of the City of Geneseo, at about 3 o'clock, A. M. on December 15, 1940. The weather was clear and the crossing was well lighted. State Street runs north and south, and appellants' tracks, running northwesterly and southeasterly, cross it at an angle of 15°, 34'. The railroad right of way is 100 feet wide with four tracks, and the west bound track, second from the south, is approximately 62 feet north of the south right of way line. The crossing is equipped with a crossing bell and gates, manually operated from a watchman's shanty on the west side of the street south of the tracks, with twenty four hour service. There is a 30 foot drive way running west from State Street immediately south of the tracks. East of State Street the railroad runs straight for a distance of four miles. South of the tracks on

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is agreed by applicant to be the condition of the loan.

One final point is worth mentioning. The

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the east side of State Street there is a police station ten feet wide north and south and twenty feet long east and west. The northeast corner of the police station is 33.1 feet south of the center of the west bound track. South of the police station there is an alley eleven feet wide, south of which the east side of the street is built up solid to the end of the block some 200 feet south of the crossing. Decedent's automobile, driven by Owen H. Whitten, a deaf man, and in which the decedent was riding on the front seat with the driver, while proceeding north across the railroad tracks, was struck in the center by a west bound fifteen car passenger train, not scheduled to stop at Geneseo, and both occupants of the automobile were killed. They and the automobile were carried on the pilot of the locomotive to where it stopped, about three quarters of a mile west of the crossing. The train was about twenty-three minutes late, but was traveling at about its usual speed of seventy miles per hour.

The principal factors entering into the question of whether the verdict is against the manifest weight of the evidence are whether the crossing gates were lowered prior to the collision, whether the locomotive bell and whistle were being sounded, the respective speeds of the automobile and the train, and the distance south of the railroad tracks at which the approaching train could be seen in time to have stopped the automobile and thus avoid the accident.

The deceased and Owen Whitted were each familiar with the crossing and its surroundings. Shortly before the accident they had been in a restaurant on the east side of State Street about two blocks south of the crossing and left there with William Daniels, who preceded them in his own car north on State Street. He testified that he was going between

fifteen and twenty miles per hour. There was a stop light at a cross street approximately 240 feet south of the railroad crossing. Mr. Daniels further testified that his attention was first called to the train by its lights flickering in his car windows, and that when he crossed the tracks the crossing bell was not ringing, the gates were up, and that he did not see them go down at any time that night; that the train was then about 1200 feet away, which distance accords with the testimony of the engineer and the fireman of the train. He also testified that as he passed the meat market in the second building north of the railroad tracks, he looked back and saw the decedent's car at the stop light of the cross street, but could not tell how fast it was going. He did not testify that he looked back thereafter.

The locomotive was equipped with an electric head light focused 800 to 1200 feet ahead, and was visible for a long distance. The train bell and whistle were loud sounding. The bell was ringing continuously ever since the train left Bureau, and the whistle was blown about three quarters of a mile east of State Street, and almost continuously thereafter for each street crossing until it struck the decedent's automobile. It is conceded by appellee that the head light, the bell and the whistle on the train were operating.

Clayton Jaquet, night patrolman, and Fred Fricke, merchant police, were in the police station at the time of the accident. Mr. Fricke was sitting near the south window in the west side of the station, and Mr. Jaquet was sitting at the window in the north side. Each testified to seeing the lights of the decedent's automobile as it passed the station. The fireman of the train testified that he saw the decedent's car and its headlights as it passed the alley, and as it came from behind the police station onto the tracks.

He estimated its speed at not less than 40 miles per hour. Police officer Jaquet testified that he saw the headlights of the automobile as it passed the west window in the police station and as it went onto the crossing, and estimated its speed at between 45 and 50 miles per hour. Each of these witnesses testified to experience in observing the speed of automobiles. The fireman also testified that when he first saw the decedent's automobile the train was a very short distance east of State Street, possibly 140 to 150 feet from where he sat on the locomotive. The fireman's station was about 50 feet back from the front end of the locomotive, which would put the front end not more than 100 feet east of State Street when he first saw the decedent's car passing the alley approximately 60 feet south of the west bound track. This tends to show that the automobile was traveling at a high rate of speed. On the other hand, appellee claims that as it was at the stop light about 240 feet from the railroad crossing when Mr. Daniels saw the train 1200 feet away, that in order for the collision to occur as it did, the decedent's car must have been traveling at a speed of not more than 15 to 20 miles per hour.

The decedent's employer testified that from a point in the east driving lane of State Street west of the alley, one could not see more than 50 feet of the railroad tracks to the east, and that from the north side of the police station he could not see the tracks to the east until he was practically on them. The testimony of a civil engineer, and the plat made by him, introduced in evidence, show that from a point in the center of State Street 25 feet south of the center of the west bound track, the tracks to the east are visible for 2585 feet; that from a point in the center of the street 33 feet south of the center of the same track the tracks are visible to the east for 1610 feet; that looking east through the alley from a point

six tenths of a foot south of the south wall of the police station the line of vision extended 960 feet along the west bound track, but the track was not visible all the way, and a short stretch of the rails could be seen beyond what the police station obstructed. From the center of State Street looking easterly along the west bound track, the headlight of a train could be seen four miles, and in the day time a train could be seen for approximately the same distance. Appellee concedes that these distances, as shown by the evidence, are correctly set out in appellants' brief.

The crossing watchman faced north in operating the crossing bell and the gates. He testified that he saw the train coming about two miles east, and received signals of its approach when it was about a mile away; that at that time he started ringing the bell and lowering the gates, but on account of Arnold Carlson's automobile coming from the north so fast that he could see it was not going to stop, he held the gates until it got through, still ringing the crossing bell, and then went on lowering the gates, and that when he got them down the train was "right close", between State Street and the depot, which is one block east; that the train went through before he started to raise the gates, and that he did not see the collision, but heard the crash; and that after the accident he raised the gates and stepped outside.

None of the three witnesses, Daniels, Fricke, or the engineer of the train, saw the south bound car. Fricke testified there was no car going south. The other policeman and the fireman were not asked and did not testify whether they saw it. The crossing watchman testified that before starting to lower the gates he looked south and did not see any car coming; that he looked to the west and then to the north, and that as he started ringing the bell and lowering the gates he saw the Carl-

son car coming; that it did not take long to lower the gates, but he would say about 20 seconds; that he never timed himself when pumping the gates down, and that by releasing the air it did not take as long to raise them as it did to lower them. Appellee argues that it would take only about 12 seconds for the train, traveling 70 miles an hour, to travel the 1200 feet from where Mr. Daniels saw it, and that the gates were then up.

Mr. Fricke testified that he saw the Daniels car cross the tracks about 200 feet ahead of the decedent's car; that he first saw the latter about straight across from the window where he sat, and saw the train through the north window; that he saw the collision and saw the gates all at one time, and that the gates were never lowered, but came down a trifle, not enough to notice, after the accident. He first testified that when the collision occurred he was getting out of the door of the police station. On redirect examination he testified he was sitting in his chair at the time of the collision, and saw it through the glass in the door on the west side of the station. Immediately after the crash, both police officers ran across the street to the watchman's shanty. Mr. Fricke also testified that he asked the crossing watchman what was wrong, and that the watchman replied: "I guess this is the pen for me." Some fishing tackle, which Mr. Fricke testified flew out of the back end of the decedent's car, was found at the scene of the accident. He further testified that he left the scene of the accident about five minutes after it occurred because he "figured" that the train had struck the back end of the car, and that the car had gone on.

Officer Jaquet testified that he did not see the collision, but heard the crash; that Mr. Fricke was asleep in his chair with his feet up against the woodwork and his head back

on the desk until aroused by the crash; that the windows of the police station were steamed over, and the glass in the door is too high up to see anything on the street without standing up; that when he and Mr. Fricke got out of the police station the top of the gates was moving; that they were about three quarters of the way up, within one fourth of being up, and that he could not tell whether they had been up or down, and that sometimes they hang and teter a little. He also said that at the coroner's inquest he probably testified that the gates were not down, and were just starting down. The crossing watchman denied being asked the question or making the reply to which Mr. Fricke testified, and testified that Mr. Fricke never speaks to him and that they had not talked to each other for three or four years. Mr. Jaquet testified he did not hear any such conversation, and was in a position to have heard if Mr. Fricke had said anything to the crossing watchman. Both police officers testified that when they first saw the watchman he was standing with one hand on the gate lever and the other hand on the bell cord.

The statute invoked by appellants, and the ordinance of the City of Genesee introduced in evidence, each provides that no person shall drive a motor vehicle, such as decedent's car, upon any public highway at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person; and makes a rate of speed exceeding twenty miles per hour through the business district of any city prima facie evidence of a violation of those provisions.

The evidence admittedly shows that the train was traveling about 70 miles per hour; that the headlight, the bell and the whistle thereon were operating; that there was an unobstructed view along the tracks to the east for the respective

distances from the respective points shown by appellants' evidence, and that the crossing was well lighted. The testimony of Mr. Daniels that the gates were up when he crossed the tracks is not contradicted.

The railroad tracks are planked at the crossing, and there is a gas station north of the tracks on the east side of the street. Officer Jaquet testified that he did not see the reflection of the train's headlight on the planks before it reached the crossing, but saw the reflection in the window beside him clear across to the gas station. Appellee argues that the well lighted crossing detracted from the effect of the train headlight, and that the testimony of Mr. Jaquet sustains that contention.

There is a conflict in the testimony of Mr. Daniels and the crossing watchman as to whether the crossing bell was ringing. There is a direct conflict between the watchman and Mr. Fricke as to the alleged conversation between them; as to whether there was a south bound automobile; and as to whether the gates were lowered. There is also a conflict between the testimony of Mr. Fricke and Mr. Jaquet. While there is no direct testimony that the decedent's car was traveling less than forty miles per hour, the argument of appellee as to the respective distances of the train and the automobile from the crossing when Mr. Daniels crossed the tracks as showing a much less rate of speed of the automobile cannot be ignored.

According to the testimony of the crossing watchman the train was still east of the street when he got the gates down. The crossing gates were not injured were in the same condition after the accident as before. As pointed out in the opinion of the Supreme Court, if the gates were lowered before the decedent's car entered the crossing it must have crashed the gates. While it may be argued that because of the passing of the south

bound car, with an excusable delay incident thereto in lowering the gates, that they may have come down behind the decedent's car, we are not convinced that the evidence on the question of whether there was a south bound car, and whether the gates were lowered at any time, is manifestly contrary to the verdict. We are likewise unable to say that the evidence shows that the brightly lighted crossing did not detract somewhat from the effect of the train's headlight.

The duties of a railroad company to use ordinary care and prudence to guard against injury to persons who may be traveling upon the public highway, and the duty of such a person to use ordinary care and caution for his own safety in crossing the tracks, are reciprocal, and equally binding upon the respective parties.

The fact that appellants maintained 24 hour service at the crossing demonstrates that they recognized its dangerous character at all times, and the necessity of giving the public timely and adequate warning of the approach of trains. From familiarity with the crossing and its surroundings, the decedent and Mr. Whitted must have known of the customary warning signals. If, as the jury evidently believed, the gates were not lowered, this amounted to an invitation to travelers on the highway, and was an assurance to them that they could cross the railroad tracks in safety. (Humbert v. Lowden, 385 Ill. 437, supra, and cases cited.) The opinion in that case also quotes Chicago and Alton Railroad Co. v. Pearson, 184 Ill. 386, and Chicago and Eastern Illinois Railroad Co. v. Schmitz, 211 Ill. 446, as holding that it is not a rule of law that the omission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty. The court further said in the opinion: "The deceased was not charged with knowledge that the train would be operated at a high and dangerous rate

of speed, without the operation of the crossing gates, nor was he charged with knowledge that the crossing gates would not be operated. They were installed for that purpose. It was the duty of appellants to operate the crossing gates, or to otherwise protect the crossing. Anticipation of negligence on the part of others is not a duty which the law imposes upon travelers upon the highway. They have the right to presume that trains will be operated in a proper and skillful manner and that the crossing gates, installed for that purpose, will be operated, so as to prevent them from going on the crossing in front of an approaching train."

Whether the gates were lowered, and whether the speed of the train without the gates being lowered was so excessive as to constitute negligence on the part of the appellants, and whether the speed of the decedent's car and the apparent failure to look and listen when approaching the railroad tracks, constituted contributory negligence, were questions of fact for the jury. In determining the sufficiency of the evidence to support a verdict, the question is not what the court would have found upon the same state of proof, but the question is whether the verdict is so clearly against the weight of the evidence as the result of passion, prejudice or other improper influence upon the jury as to require granting a new trial. (Bloom v. Crane, 24 Ill. 48; West Chicago Street Railway Co. v. Brown, 112 Ill. App. 351; Schneeweisz v. Illinois Central Railroad Co., 196 id. 248.) Where there is a conflict in the evidence as to the facts, the granting of a new trial is largely within the trial court's discretion, and will not be disturbed unless abused. (Lutgert v. Schaefflein, 318 Ill. App. 83, 87.) Courts are reluctant to set aside the verdict of a jury where the question at issue is a matter of fact, since the jury see and hear the witnesses testify and are in a better position to judge of their

The contention of appellants that the trial court erred in refusing to admit testimony that Mr. Whitted was not a licensed driver of an automobile, and had not complied with the provisions of the statute requiring such license, and in striking paragraphs 9 and 10 of the answer, setting up such matters as a defense, is without merit. It is manifest that the want of such a license had no causal connection with the accident, and the rule in this State is that where a violation of a statute is relied upon as a defense, such violation must be shown to have been the proximate cause of the injury. (Streeter v. Rumrichouse, 357 Ill. 234, 243). This holding is in harmony with the majority rule in other jurisdictions. (16 A.L.R. volumes). From all of the foregoing it is obvious that there was no error in denying appellant's motion for a new trial.

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credibility.

After carefully considering the applicable law as laid down by the Supreme Court in this case, and all the testimony, we are unable to say that the verdict is against the manifest weight of the evidence on either of the issues of negligence on the part of appellants or contributory negligence of the decedent.

As no instructions are set out in the abstract or the brief of appellants, and the claim that the court erred in the giving and refusal of instructions is not argued, we do not consider the claim. *People v Heywood*, 321 Ill. 380.

We are unable to agree with the contention of appellants that the amount of the verdict is excessive. The evidence shows that the decedent was living with his father and mother, aged 68 years and 64 years, respectively; that he was earning \$80 per month, and that his contributions to the family expense averaged about \$800.00 per annum, and that he performed numerous services about the home. Lineal kindred are presumed to have sustained actual damages. (*Smiley v. East St. Louis & Suburban Railway Co.*, 169 Ill. App. 29.)

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

Insert attached
folio (A)

323 351 441 541 641 741 841 941
Abstract

323 I.A. 648

61 5 72
Gen. No. 9939.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1944.

ROBERT TEECE, JR., by ROBERT TEECE,)
His Father and Next Friend,)
Plaintiff-Appellee,)
vs.)
MARTIN BIEBER,)
Defendant-Appellant.)

1363
Appeal from
Circuit Court,
Henry County.

WOLFE,-- J.

Robert Teece, Jr., as plaintiff, by his next friend, started suit against Martin Bieber in the Circuit Court of Henry County for damages he had received in an accident, which occurred on the driveway of the Washington School grounds in the City of Kewanee, Illinois, on the 7th of October 1941.

The complaint consisted of one count charging that the plaintiff was attending the public school in Kewanee, Illinois; that the defendant was driving his automobile on a private driveway, or alley on said grounds and then and there, through his negligent and careless driving, control and management of his automobile, ran into and struck Robert Teece, Jr., and

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IN THE
COURT OF THE DISTRICT OF COLUMBIA
SOUTHERN DISTRICT
JANUARY 1, 1914

ROBERT T. SPENCER, JR.,
Plaintiff,
vs.
JAMES A. WILSON,
Defendant.

FILED -- J.

Robert Spencer, Jr., an individual, is a resident of the District of Columbia, and is the owner of a certain piece of property in the District of Columbia, to-wit: a certain lot of land in the City of Washington, District of Columbia, containing a certain building thereon, and is the owner of a certain interest in the same. James A. Wilson, an individual, is a resident of the District of Columbia, and is the owner of a certain piece of property in the District of Columbia, to-wit: a certain lot of land in the City of Washington, District of Columbia, containing a certain building thereon, and is the owner of a certain interest in the same. The plaintiff claims that the defendant is in possession of the property of the plaintiff, and that the defendant is liable to the plaintiff for the same. The defendant claims that the plaintiff is in possession of the property of the defendant, and that the plaintiff is liable to the defendant for the same. The court has heard the evidence of both parties, and has rendered its decision in favor of the plaintiff.

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injured him. It also charges that Robert Teece, Jr., at the time of the accident, was in the exercise of due care and caution for his own safety.

The defendant filed his answer in which he denied that the driveway in question is a private driveway, or a private alley, or that Robert Teece, Jr., was in the exercise of due care and caution for his own safety, or that the defendant was guilty of any negligence, which was the proximate cause of the injury to the plaintiff, or that the plaintiff was entitled to any damages whatsoever. At the close of the plaintiff's evidence, the defendant presented a motion and instruction for the court to instruct the jury to find the defendant not guilty. This motion was overruled. The defendant then presented, at the close of all of the evidence, a like motion and instruction to the Court, and this motion was overruled. The jury found the defendant guilty and assessed the plaintiff's damages at \$3500.00. The defendant entered a motion for a new trial, which was overruled. A motion in arrest of judgment was then presented, which was likewise overruled. Judgment was entered on the verdict in favor of the plaintiff for \$3500.00, and from this judgment the defendant has perfected an appeal to this Court.

The evidence shows that the plaintiff, Robert Teece, Jr., at the time of the accident was a little past 7 years of age; that Martin Bieber, the defendant, had driven into the public school grounds in Kewanee, Illinois, for the purpose of

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taking his son to the school and it was while travelling on the driveway inside the school grounds, that he struck and injured Robert Teece. The appellant, Martin Bieber, now insists that the Court erred in not directing a verdict in his favor, as requested at the time of the trial. From a review of the evidence we think the plaintiff made out a prima facie case, which should have been submitted to the jury for their determination, and the Court did not err in refusing the instruction offered by the appellant.

It is next insisted that the Court committed reversible error in not permitting the defendant to prove that the driveway in question, had been used by the general public. The plaintiff, in his complaint, charges that this was a private driveway, or a private alley, which the defendant in the fourth paragraph of his answer expressly denies. This raised an issue of fact. The defendant should have been permitted to prove that the drive was not a private one, but was used by the public generally. The plat introduced in evidence shows that this was platted as a private driveway, but still the defendant had the right to show that for a long time the public generally has used and is using this driveway in driving over the same. A part of the argument to the jury of Mr. Wilamoski and Mr. Young, Attorneys for the plaintiff, is in the record, and in view of their argument, it became doubly necessary that the jury should have been informed whether the public generally was using this driveway for the use of automobiles.

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On the trial of the case, and over the objection of the attorneys for the defendant, the plaintiff was permitted to ask the defendant whether certain little girls who had testified in the case, were telling the truth. This not only put the defendant in an embarrassing position, but put him in an unfavorable light before the jury, by compelling him to say whether the little girls were not telling the truth. The attorneys insisted upon an answer of "Yes," or "No." Whether the little girls were telling the truth about where the car stopped, or whether Mr. Bieber's statement as to where he stopped after the accident, was a question wholly for the jury to determine. We think it was reversible error to compel the defendant to answer such questions.

Complaint is made of plaintiff's instruction No. 6. We think it was error for the Court to give that instruction in the form it was presented. It was so held in the case of Herndobler vs. Goodwin, 310 Ill. App. 267. Complaint was also made in regard to instruction No. 5, which uses the language, "drove his car so carelessly and negligently, as charged in the complaint that it was not in control, so as to avoid striking persons passing along, or crossing said driveway." It is contended that this instruction refers the jury to the complaint in order to find what negligence is charged against the defendant, and in such cases our Supreme Court and Appellate Courts have

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severely criticized such instructions. This instruction states the negligence charged in the plaintiff's complaint. We do not think it was reversible error to give instruction No. 5. We find no merit in the criticism of the other instructions of the plaintiff, nor do we think defendant's refused instruction No. 16, in any way prejudices his rights.

We express no opinion whatsoever in regard to the merits of this controversy, or whether the judgment is against the weight of the evidence. From the conclusions that we have reached in regard to other points raised, the case will be reversed and remanded to the trial court for a new trial.

Reversed and Remanded.

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Abstract

323 I.A. 648

Gen. No. 9957.

Agenda No. 7.

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

1373

TO THE MAY TERM, A. D. 1944.

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel. LESTER F.)
CARSON, State's Attorney,)
Peoria County, Illinois,)
Defendant in Error,)
vs.)
ELI CUPPI,)
Plaintiff in Error.)

Writ of Error to
the Circuit Court,
Peoria County.

WOLFE, -- J.

On the 22nd day of December, 1943, Lester F. Carson, the State's Attorney, in, and for the County of Peoria, State of Illinois, filed an information on behalf of the People of the State of Illinois, "Charging Eli Cuppi with contempt of Court." The petition alleges that there was a habeas corpus proceeding before the Honorable Henry J. Ingram, one of the Judges of the Circuit Court of said Peoria, County; that one Sam Belfer was a witness in said proceeding and testified to certain acts with one Betty Dane, which took place in the tavern and resort located in the City of Peoria, which was commonly known as the Swing Club;

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Exhibit

Vol. No. 9077

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

VS.

THE PEOPLE OF THE DISTRICT OF COLUMBIA
vs.
JOHN W. WATSON
Defendant

JOHN W. WATSON
Defendant

ALL OTHERS
Plaintiff in Error

WITNESSES -- 1.

On the 1st day of December, 1907, the State's Attorney, for the District of Columbia, filed an information in the Court of the District of Columbia, charging with the crime of larceny the defendant, John W. Watson, and the said information was returned by the Grand Jury of the District of Columbia, and the said defendant was arraigned before the Honorable Henry J. Ladd, one of the Judges of the Circuit Court of said District, County; and the said defendant was witness in said proceeding and testified on certain facts with one Betty Dams, which took place in the District and vicinity located in the City of Peoria, which was commonly known as the Swing Club;

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that said tavern was owned and operated by the said Eli Cupi; that the said Eli Cupi sat in the Court room and heard and observed the proceedings therein; that at the hour of twelve o'clock noon of said day Judge Ingram recessed said Court until two o'clock P. M. of the same day.

The information further charges: "That immediately upon the recessing of said court as aforesaid, the said Sam Belfer departed from said court room of the Honorable Henry J. Ingram with the other witnesses who had testified in said cause and who were yet to testify, and proceeded into the corridor and down a portion of the stairway leading from the third floor to the second floor of said courthouse; that while approximately midway down said stairway and while within approximately fifty feet from the said court room of the said Honorable Henry J. Ingram, the said Sam Belfer was viciously and violently assaulted and attacked by the said Eli Cupi and was then and there forcibly struck in the face by the said Eli Cupi.

"That said assault took place in the view of witnesses who had previously testified in said habeas corpus cause and in the view of others who were yet to testify in said cause.

"That there was no justification for, or fact in mitigation in the conduct of the said Eli Cupi as aforesaid, and his said actions were contemptuous and tended to obstruct the proper administration of justice and lower the dignity of the courts of justice, and particularly the court of justice

that said room was owned and operated by the said E. J. ...

that the said E. J. ...

observed the proceedings ...

o'clock room of said ...

two o'clock P. M. of the said day.

The information ...

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the courts of justice, and particularly the courts of justice

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then and there presided over by the Honorable Henry J. Ingram, as aforesaid." There is a prayer for an order that the Court enter a rule against Eli Cupi commanding that he appear in Court within a short time and show why he should not be adjudged guilty of contempt of Court, and be questioned on matters and things alleged in said petition. This petition was signed by Lester F. Carson, State's Attorney of Peoria County. The petition was verified.

Eli Cupi appeared and gave bond in the sum of \$1500.00. Then he entered a motion to quash the information and warrant and discharge the rule therein. He also filed a motion to strike certain paragraphs of the information. Each of these motions was overruled, and the defendant was ruled to answer the petition. He filed an answer in which he admits that the case was being tried as stated in the complaint, and that Belfer was a witness in the same, but alleges that he was sitting with his back towards Belfer and was unable to hear the testimony that Belfer was giving. He admits that he was the owner of the tavern in question. He admits that he was sitting in the Court Room, and that he was able to observe the proceedings, but says he did not understand the testimony of the various witnesses. Section 6 of the answer is as follows: "Answering paragraph 6, the defendant respectfully represents that at the time the court recessed, he departed from the court room through the rear door; that the witnesses and attorneys who were taking part in the case departed through some door other than the door through which he, this defendant, departed; that on said day the elevator in the courthouse was not

then and there presented over by the defendant, J. J. ...
 as aforesaid." There is a question as to whether the ...
 enter a rule against the defendant, but it appears to ...
 Court within a short time thereafter and the result of the ...
 ability of defendant to pay, and the possibility of ...
 things alleged in said petition. This petition was signed by ...
 Lester P. Benson, Justice of the Peace at ...
 was verified.

His Honor ...
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running and that he started walking down the stairway all alone, by himself; that he was attending to his own business, speaking to no one; that he molested no one, nor did he offer to molest anyone; that he has been acquainted with the said Sam Belfer for some months and he and the said Sam Belfer have, during that period of time, been very unfriendly toward each other; that as he was going down the steps he was in the rear of said Belfer and started to pass him and that at the time he came alongside of said Belfer he and the said Belfer became engaged in an argument over matters in no way connected with the case on trial; that names were called by both him and Belfer and that when they came to the second landing of the stairway, they both squared away and faced each other; that Belfer adopted a belligerent attitude; that Belfer is a much bigger man than this defendant and that this defendant was fearful Belfer was going to strike him; that Blows eventually were struck by both this defendant and Belfer, without injury to either of them; that he, this defendant, was only attempting to defend himself, at which time the said Belfer struck him a violent blow with a heavy briefcase; that this defendant was backing away when he was grabbed by bystanders and his arms pinioned, at which time Belfer continued to attempt to strike him and that while he, this defendant, was still being held, the said Belfer kicked him twice in the groin and threatened him with great bodily injury."

The defendant admits that there were people on the stairway at the time the trouble took place, but he stated he

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does not know who the persons were. This is followed by another paragraph in which the defendant attempts to justify his behaviour, and that he did not wilfully or intentionally intend in any manner, to intimidate any witness or witnesses; that he had no thought of attempting to impede, obstruct, or interfere with the administration of public justice, and the acts which he committed, he believed that he was justified in doing to defend himself. He prays that the rule to show cause be discharged, and that he be dismissed.

It is conceded that the only thing to be considered in this case is the petition filed by the State's Attorney and the answer, and justification of the defendant. The law is clearly stated in the case of the People vs. Severinghaus, 313 Ill. 456. The Court, having considered the answer of the defendant, found that it is insufficient and evasive, and constitutes conclusions rather than facts. The Court found the defendant in contempt of Court and sentenced him to the Peoria County jail for 90 days. The case has been brought to this Court by a Writ of Error.

The answer of the defendant shows that there was a fight between Mr. Cupi and the witness, Sam Belfer, but it is wholly silent on the question who struck the first blow. It is alleged in the complaint that Cupi viciously and violently assaulted and struck Belfer. This is not denied in the answer, nor is it denied that the fight took place before other prospective witnesses in the case on trial in the Circuit Court. What Belfer

does not know who the persons were. There is nothing in the paragraph in which the defendant attempts to justify his conduct, and that he did not think or intend to do anything, or to intimidate any witness or witnesses; that he was not attempting to make, directly or indirectly, any statement or representation of public justice, and the facts which he stated, he believed that he was justified in doing so before himself. He prays that the jury to whom evidence is introduced, and that he be dismissed.

It is contended that the only reason for his conduct in this case is the realization of a large amount of money and the answer, and justification of the defendant. The law is clearly stated in the case of the People vs. Boyer, 111. 452. The Court, having considered the answer of the defendant, found that it is insufficient and evasive, and contrary to the conclusions reached by the Court. The Court found that the conduct of the defendant was not justified, and that he was guilty of a crime. The case was then brought to this Court by a writ of error.

The answer of the defendant shows that there was a fight between Mr. Goff and the witness, and that he was wholly silent on the question who struck the first blow. It is alleged in the complaint that Goff maliciously and unlawfully assaulted and struck Goff. This is not shown in the answer, nor is it denied that the fight took place before other persons. Witnesses in the case on trial in the Circuit Court. The Court

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did when he adopted a belligerent attitude, which made Cupi think Belfer was going to strike him, is purely a conclusion of the defendant. We agree with the trial court that the answer does not set out, nor clearly show that Cupi was acting in self defense.

~~In the case of the People vs. Severinghaus, (supra,) it is stated as follows:~~ The defendant must make a true answer to the charges of contempt committed out of Court, and answer each and every charge definitely and directly, and may state with what intent he did the acts, and make a denial that he did anything with the intention of slowing up, or deterring the administration of justice; and while this would not purge him of contempt of Court, he is entitled to have his answer considered by the Court of the offenses, but it is not sufficient to accord him complete justification. ⁽¹¹⁾ No doubt the trial court had this rule of law in mind when he passed sentence on the defendant in this case.

We find no reversible error in this case, and the Judgment of the Trial Court is affirmed.

Judgment affirmed.

People v. Severinghaus (supra).

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Abstract

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323 I.A. 648¹

Gen. No. 9960.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

1383

AT THE MAY TERM, A. D. 1944.

| | | |
|-------------------------------|---|--------------------|
| MARY SALUTO, |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| vs. |) | |
| |) | |
| PUBLIX GREAT STATES THEATERS, |) | APPEAL TO THE |
| INC., a Corporation, |) | APPELLATE COURT OF |
| Defendant-Appellant. |) | ILLINOIS, SECOND |
| |) | DISTRICT, FROM THE |
| |) | CIRCUIT COURT OF |
| |) | PEORIA COUNTY, |
| |) | ILLINOIS. |

WOLFE,-- J.

Mary Saluto recovered a judgment in the Circuit Court of Peoria County, Illinois, for \$500.00 against the Publix Great States Theaters, Inc., for injuries she claimed to have sustained by falling on the stairs of the theater owned by the defendant. The plaintiff filed a complaint consisting of two counts. Count one was withdrawn by her, at the close of her evidence. Count two charges that the plaintiff was a patron of the defendant's theater, on May 3, 1942; that she had purchased an admission ticket before she attended the show; that after she had attended the show, as she was leaving the theater, she fell on the steps in the lobby. She charged that this happened because the defendant

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negligently and recklessly permitted popped and unpopped grains of corn to become scattered upon, and over the stairway of said theater. At the trial, the plaintiff testified in her own behalf. She called a corroborative witness, Joseph McReynolds, who testified that he saw the plaintiff just after the accident occurred. At the close of the plaintiff's case, the defendant entered a motion and presented an instruction to the Court for a directed verdict to find the defendant not guilty. This motion was denied, and the instruction was refused. The defendant then called witnesses in its behalf, and at the close of the evidence, the defendant entered a motion for a directed verdict, which was likewise overruled. The case was submitted. The appellant has found no fault relative to the instructions given them by the Court. The jury found the issues for the plaintiff, and assessed her damages at \$500.00. Judgment was entered on the verdict, and it is from this judgment that the defendant has perfected an appeal to this Court.

The appellant has not seen fit to file any points relied upon for reversal, but has divided its written argument into three parts. The first one being that the trial court erred in not directing a verdict in the defendant's favor at the close of the plaintiff's evidence. The appellant is not now in a position to raise this question. Any right that it had under this motion has been waived, because instead of standing on the

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motion, it introduced evidence to rebutt the testimony of the plaintiff. Popadowski vs. Bergaman, 304 Ill. App. 422; Kahler vs. Marchi, 307 Ill. App. 23; Salzman vs. Boeing, 311 Ill. App. 83; Hirshman vs. National Mineral Co., 311 Ill. App. 169; Goldberg vs. The Capitol Freight Lines, Ltd., 314 Ill. App. 347; (Affirmed in 382 Ill. ~~383~~,) and Turner vs. Cummings 319 Ill. App. 225.

It is next insisted by the appellant that the trial court erred in not directing a verdict in its favor at the close of all of the evidence. This motion properly preserved the right of the defendant on the question whether, taking all the evidence introduced, the plaintiff was entitled to a verdict, (Goldberg vs. Capitol Freight Lines 382 Ill. 283). The appellant quotes certain parts of the plaintiff's testimony, as tending to show that a grain of popcorn did not cause her to fall, as she alleged in her complaint. An examination of the record discloses that the plaintiff's testimony was not as positive and direct as it is in some cases. However, the record does show that in answer to the question, "Do you know what, or if anything, made you lose your balance or not?" She answered, "Those popcorn there," and as they brought me up, I told him, "There is where I fell, there where they sell the popcorn, and I felt something hard on my shoe, and that caused me to fall." In answer to another question, a part of her answer is, "When I went only two steps, I lost my

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balance on this corn, and I fell." Another answer is, "There was popcorn there when they picked me up, and I know that it was the popcorn that made me fall, because I had popcorn stuck on my foot." Another place she said, "As I started to fall, I felt something on my foot, and I fell down." Another statement, "As I stepped on the step, I felt something hard, and all at once I went, I did not have time to help myself, or even protect myself to fall;" "I went all at once, because the popcorn must have been on the edge of that marble step, and I went right on." The plaintiff further testified that after she fell there was a hard grain of unpopped popcorn on the sole of her shoe. She further testified as to the extent of her injuries, but this is not disputed, nor is the amount of the verdict claimed to be excessive, so there will be nothing more said in regard to that part of her testimony.

Mr. Joseph McReynolds was called as a witness on behalf of the plaintiff and testified that he saw her immediately after the accident; that while she was sitting on the steps, there was popcorn on the steps nearby; that there were popped and unpopped grains of corn on the stairs.

Mr. James B. McDermott called on behalf of the defendant, testified that he was the manager of the theater in question, and was also the manager on May 3, 1942, at the time of the accident in question; that on this afternoon the attendance at the theater was 904 persons. He did not see Mrs. Saluto fall.

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He directed the two ushers to bring Mrs. Saluto upstairs, and he then called a doctor. Shortly thereafter, he examined the stairs and found nothing upon them. In his answer to the question, "Whose duty is it to see that these stairs are kept clean," Mr. McDermott answered, "Well, I give instructions to the popcorn attendant, the doorman, if anybody should spill popcorn on the steps, any patron, that the popcorn girl should notify the doorman, and he was to immediately go out there and clean up, brush up, sweep up." Mr. McDermott testified that he did not see Joseph McReynolds in the theater at the time Mrs. Saluto fell.

Thelma Masefield was called by the defendant as a witness. She testified she was commonly called "the popcorn girl" on May 3, 1942, and had charge of the popping and selling of popcorn; that the popcorn machine was located inside of the theater close to the bottom of the stairway on which the accident occurred; that she didn't see McReynolds in the theater at the time, and was positive that he was not there. She testified that a Mr. Miller, one of the ushers, had swept the stairway about five minutes before Mrs. Saluto fell; that she asked him to sweep it; that they swept the stairs 12 to 14 times on this Sunday afternoon; that whenever she saw any popcorn around, she asked that the steps be swept; that at that time she asked Mr. Miller to sweep the steps about five minutes before Mrs. Saluto fell; that there was popcorn on the steps, and that the popcorn had butter on it.

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Chester Miller, called as a witness, testified in regard to finding Mrs. Saluto on the steps, and assisting her up the steps to where the manager of the theater had directed him to take her; that he never saw Mr. McReynolds in his life, and did not think he was in the theater at the time of the accident in question. He testified that there was no popcorn on the steps; that he had swept the steps about five minutes before the accident; that it was a part of his business to keep the steps clean. The record was in this state when the cause was submitted to the jury. It was for the jury to decide whether Mrs. Saluto and her witness were correct in their version of how the accident occurred, or whether the defendant's witnesses were more worthy of belief. They have decided in favor of the plaintiff, and against the defendant. It was purely a question of fact for their determination. We cannot say that their verdict is against the manifest weight of the evidence. It is our conclusion that the evidence preponderates in favor of the plaintiff. The judgment is hereby affirmed.

Judgment affirmed.

42706

FRANK P. BURNETT, et al.,
Appellants,

v.

MARY E. WALZER, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

323 I.A. 648²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order dismissing their complaint to set aside certain alleged fraudulent transfers of property by Alfred Walzer, now deceased.

Plaintiffs are creditors of what the parties designate as the old, and the consolidated, Garfield State Bank. The old bank carried on a banking business until November 12, 1929, when a consolidation with another bank was effected under the name of Garfield State Bank, which continued in business until June 11, 1931. On September 3, 1931 certain of the plaintiffs herein, as representative creditors of the consolidated bank, filed their complaint to enforce the liability of the stockholders. July 16, 1936 a decree was entered finding Alfred Walzer to be the owner of 263 shares of the bank and directing him to pay \$26,300 to the receiver within ten days. Alfred Walzer died August 12, 1933, but plaintiffs and their attorneys did not learn of his death until some time in 1938, when amendments to the complaint were filed seeking to hold his widow, Mary E. Walzer, and his son, Alfred B. Walzer, liable for the full amount owing by Alfred because of property received by them as heirs - no administration of the estate having been had. In November 1940 further amendments to the complaint were made to make the pleadings conform to the evidence, and a decree was entered against Mary E. and Alfred B. Walzer for \$26,705.50. On appeal that

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decree was reversed by this court, "principally upon our conclusion that the court was without jurisdiction to bring in these defendants as additional parties two years after the final decree of July 16, 1936." Madigan Bros., Inc. v. Garfield State Bank, 310 Ill. App. 358.

June 11, 1937 the remaining plaintiffs herein, as representative creditors of the old bank, instituted a suit to enforce the liability of the stockholders of that bank, and made Alfred Walzer a defendant thereto as the owner of 56 shares. Later, amendments were filed, and Mary E. and Alfred B. Walzer were made defendants and charged with liability for the full amount owing by Alfred Walzer in his lifetime. On hearing a decree was entered dismissing the suit as to the Walzers. No appeal has been taken from this portion of the decree and it is now in full force and effect. Shortly after denial of a rehearing by this court in the Madigan case, plaintiffs' attorneys sought to have letters of administration in the estate of Alfred Walzer, deceased, issued to Robert E. Dowling, Jr., as a creditor of the old bank and the consolidated bank. Administration was denied by the Probate court and by the Circuit court. On appeal that action was affirmed by this court. In re Estate of Walzer, 319 Ill. App. 507. On the same day that letters of administration were sought, plaintiffs, as representative creditors of the old bank and the consolidated bank, filed the present suit seeking to set aside certain alleged fraudulent transfers of corporate stock, mortgage notes, etc., by Alfred Walzer to Mary E. and Alfred B. Walzer. Defendants filed a motion to dismiss the complaint, assigning as one of the reasons therefor that "The supposed claims and demands of plaintiffs herein asserted as creditors of Alfred Walzer, deceased, have never been proved or allowed as claims against his estate in the Probate court of Cook county, Illinois. No action will lie for the enforcement of any such supposed claims

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against these defendants until after the adjudication of same in the Probate Court."

The alleged claims of plaintiffs against Alfred Walzer as a stockholder of the defunct banks are legal claims which matured on the closing of the consolidated bank on June 11, 1931, and therefore were due and owing at the time of the death of Alfred Walzer. No administration of the estate of Alfred Walzer was had and no application for letters of administration made by anyone until the application made by Dowling in 1941, almost 8 years after the death of Walzer. The alleged claims were never reduced to judgment against Walzer or allowed against his estate. It is the settled law of this state that the entry of a judgment or the allowance of a claim against an estate is a condition precedent to setting aside or avoiding a fraudulent conveyance by a debtor. In Scripps v. King, 103 Ill. 469, the court said: "When the property, if not conveyed, would be subject to sale under a judgment at law, the creditor must obtain a judgment or decree, as though the rights sought to be subjected were purely equitable, before he can maintain a bill, and when the claim is against an insolvent estate, the creditor must have it properly allowed against the estate before he can remove a fraudulent conveyance to reach the property to satisfy his demand. He, in other words, must exhaust his legal remedies." To the same effect is Houston v. Maddux, 179 Ill. 377, where a simple contract creditor of decedent was denied the right to reach by bill in equity certain insurance premiums alleged to have been fraudulently paid by decedent when insolvent. See also Goodman v. Kopperl, 169 Ill. 136.

The complaint not being maintainable for want of allowance of the claim against the estate of Walzer, it is unnecessary to consider the other objections urged by defendants.

The order dismissing the complaint is affirmed.

ORDER AFFIRMED.

O'Connor, J., and Matchett, J., concur.

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HELEN E. MENTEN, Administratrix
of the Estate of Earl T. Menten,
deceased,

Appellant,

v.

ILLINOIS PUBLISHING AND PRINTING
COMPANY, a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 649¹

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, administratrix, appeals from a judgment entered upon a verdict finding defendant not guilty in an action for the wrongful death of her husband. Plaintiff contends that the court erred in giving instructions and in receiving evidence offered by defendant. Defendant says that the evidence overwhelmingly supports the verdict of the jury and that had the verdict been for plaintiff it could not have been sustained. The case has been tried twice. On the first trial the jury disagreed.

Deceased was injured on Western avenue just north of its intersection with Diversey and Elston avenues in Chicago, about midnight on Friday, August 18, 1939. Western avenue is a north and south street, 70 feet in width from curb to curb. Diversey avenue runs east and west, and Elston avenue northeast and southwest. The Canary Barbecue, on the northeast corner of Western and Diversey, has an entrance on Western avenue about 40 feet north of the north line of Diversey. After eating at the barbecue, deceased was seen standing at the east curb of Western avenue about 20 to 25 feet north of the corner. He was next seen by Metscher, the driver of a trailer-truck north bound on Western avenue as "something that appeared to be ** a bag or a bundle of papers falling off the back end of the truck" of defendant, moving north in Western avenue

WILLIAM J. BULLMAN, Plaintiff,
vs.
JOHN J. BULLMAN, Defendant.

v.

WILLIAM J. BULLMAN, Plaintiff,
vs.
JOHN J. BULLMAN, Defendant.

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IN SENATE, JANUARY 1, 1908.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE,
JANUARY 1, 1907, RELATIVE TO THE LANDS BELONGING
TO THE STATE OF NEW YORK.

ALBANY: J.B. LIPPINCOTT COMPANY, 1908.
NEW YORK: J.B. LIPPINCOTT COMPANY, 1908.
THE STATE OF NEW YORK,
OFFICE OF THE COMMISSIONERS OF THE LAND OFFICE,
ALBANY, JANUARY 1, 1908.

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in a lane east of the north bound street car tracks. As he saw this object at the rear of the truck he saw another auto (identified by other witnesses as a Buick sedan) coming from away over to the right of the street, slightly behind and to the east of the newspaper truck just going by it on the car track. The witness threw up his lights and saw deceased lying unconscious in the street at a point fixed by the various witnesses from 5 to 25 feet north of the entrance to the barbecue and 5 to 12 feet from the east curb of Western.

A patron of the barbecue, who had been drinking before arriving there, became sick and went to the east curb of Western, north of the entrance of the barbecue stand between two automobiles parked along the curb, to vomit. He had just finished when he heard a thud which seemed to come from out in front of him. He stepped into the street so that he could see to the north beyond the parked automobile and saw deceased lying on the pavement and defendant's truck and the sedan traveling north. The sedan was at the front end of the truck and was going faster. The witness did not see what struck or injured the deceased.

An attendant at a filling station on the southwest corner of Diversey and Western, who had gone across Diversey avenue to a tavern just west of a drug store at the intersection of Diversey and Elston avenue, west of Western, testified that he was looking through the screen door of the Elston avenue entrance to the tavern (from 100 to 150 feet from the east curb of Western), across to the Canary Barbecue where his girl friend was working; that he saw the sedan and the newspaper truck about 10 or 15 feet from the corner of the barbecue stand; the sedan was about half an auto length ahead of the truck, riding the rails, and the truck was about half the length of the car to the right of the sedan, or the east rail; that he heard an impact which he said pushed the headlight of the truck into the air; he never noticed the man that got hit

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in a large number of the houses... this object of the... by other witnesses... right of the... nearly... up his... point... the entrance to the... of...

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until after the impact; after the truck had passed he saw the body 5 or 6 feet north of the entrance to the barbecue and on the right hand side of the truck; the head was about 4 or 5 feet from the curb and the feet were 8 to 10 feet from the east street car track - (this makes the body 12 to 15 feet long); the truck was a Diamond T truck of the Herald-Examiner; a poster on the panel of the truck had something referring to a golf or caddie tournament; this was in blue letters with a white background, with the words Herald-Examiner about the second line from the bottom of the poster in pretty large print; he could tell that it was a Diamond T truck by the construction - the type of wheels and fenders that was on the truck - it had heavy wooden spoke wheels; he presumed the sedan was a 1937 or 1938 Buick; it was black in color, 4-door deluxe model, chrome trimming, and everything on the car in better styling than the ordinary standard Buick. He did not go^{to} the scene of the accident until after the body had been removed, and claims to have seen all the things about which he testified from behind the screen door of the tavern, west of Western avenue. He is the only witness who testified that the newspaper truck was a Diamond T.

Metscher and four employees of the defendant testified that several trucks of the defendant were loaded with newspapers at Milwaukee and Western avenues; that three of the trucks proceeded north, one turning off at Fullerton avenue, the other two continuing to Diversey avenue where both were stopped by the traffic lights; one truck, riding the rails, turned to the left on Diversey when the light turned green for north and south traffic; the other truck, which was to the right, near the east curb of Western avenue, delivered some papers at the news stand and, having the light, proceeded north in Western avenue. Metscher testified that when the light turned green for north and south bound traffic at Diversey he stopped as the newspaper truck turned to the left in

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front of him, and then followed the other newspaper truck across Diversey avenue, and that it was from this truck that the bag or bundle appeared to fall. The truck was a Chevrolet. The driver, Logan, and his helper, Schmuhl, denied striking anyone or knowing anything about the accident. They further denied that the headlight was damaged or that the car bore any marks of having struck anyone. In this they are corroborated by the testimony of another employee of defendant and of police officers who examined the truck at the garage several hours later and after Logan had been informed of the accident. Plaintiff concedes that Logan's car was not involved in the accident, stating in her brief that "The facts show that Logan was not the driver of the truck that struck Menten."

The uncontradicted evidence shows that defendant rented its delivery trucks from the Garage Service Company. This company in the usual course of business kept records showing the times when its trucks left its garages and returned, the driver of the truck when in service and whether or not the trucks were damaged on return to the garage. These records covering the time of the accident were properly received in evidence over objection of plaintiff. P. C. C. & St. L. R. Co. v. City of Chicago, 242 Ill. 178, 192-194; C. & N.W. Ry. Co. v. Ingersoll, 65 Ill. 399, 404-405. They showed a limited number of Diamond T trucks in the service of defendant on the night of the accident. The drivers of these trucks were called as witnesses and the evidence shows none of them was in the neighborhood of the accident. In fact, none was north of Lake street, which is several miles south of Diversey. Other testimony of the defendant shows that the Chevrolet truck driven by Logan was the only truck of the defendant at or near the scene of the accident when deceased was injured.

Plaintiff's case as to defendant's negligence rests upon the testimony of the filling station attendant, which the jury rightly rejected. His testimony is contradicted by a number of witnesses. As to some matters it is improbable. He saw and told

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too much. No witness saw the deceased from the time he left the curb until after plaintiff's witnesses heard the thud or Metscher saw what appeared to be a bag or bundle falling off the back end of defendant's truck. No one saw the truck or sedan hit him. It is apparent that he was out in the street, some distance north of the intersection, when he was struck. As to the exercise of due care by deceased, plaintiff is forced to rely wholly on evidence tending to show the deceased was a man of careful habits.

The first instruction complained of fixes a different standard for negligence of defendant and contributory negligence of deceased. It is substantially like the instruction held to be erroneous in Schmidt v. Anderson, 301 Ill. App. 28. More instructions relating to due care of the deceased were given than were necessary, but those given were substantially correct. However, the overwhelming weight of the evidence supports the verdict of the jury. As said in Fuzessery v. American Benefit Cas. Ins. Co., 256 Ill. App. 476: "Our courts have repeatedly held that the Appellate Courts will not reverse a judgment for errors in the instructions to the jury or admission of evidence where, under the evidence, the jury could have rendered no other verdict consistent with the evidence in the case." See also Pridmore v. Chicago R. I. & P. Ry. Co., 275 Ill. 386, 396; Farmer v. Davis, 289 Ill. 392, 399.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

42969

WILLIAM J. PIECZYNSKI,
Appellant,

v.

STANLEY PIECZYNSKI, Individually
and as Executor of the Estate of
Pelagia Pieczynski, Deceased,
et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

323 I.A. 649²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered on the court's motion dismissing his amended complaint for an accounting for want of prosecution, and from a subsequent order refusing to vacate the order of dismissal.

Plaintiff, as one of nine children of Pelagia Pieczynski, deceased (each of whom were entitled to a one-ninth interest in real estate left by decedent), originally filed a complaint for partition and for an accounting as to rents collected by Stanley Pieczynski and Josephine Palka. By agreement of the parties all the real estate was disposed of and the case continued solely as a complaint for an accounting. It had been referred to a master and a number of hearings were had. On May 11, 1943, the case appeared upon the trial call and, no one appearing, it was dismissed on the court's motion for want of prosecution. Thereafter, without objection, an order was entered for the entry of an appearance of an attorney for the administratrix of one of the defendants and several hearings were had before the master to and including July 29, 1943. On learning of the order of dismissal plaintiff filed his petition setting up the foregoing facts and praying that the order be vacated. Certain of the defendants, including those from whom an accounting was asked,

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1. The first part of the document is a list of names and their corresponding addresses. The names are listed in the left column, and the addresses are listed in the right column. The names are: John Doe, Jane Smith, and Bob Johnson. The addresses are: 123 Main St, 456 Elm St, and 789 Oak St.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

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objected on the ground that, 30 days having expired from the entry of the order of dismissal, the court was without jurisdiction to vacate it. The trial court accepted defendants' position and refused to vacate the order for want of jurisdiction. In this the court erred. The trial court had jurisdiction of the subject matter of the complaint, namely, an accounting. By participating in the hearings before the master and the other proceedings in the cause after the dismissal, the parties conferred jurisdiction of their persons upon the court and were estopped to deny want of jurisdiction in the court to vacate the order of dismissal. Freise v. Mid-City Trust & Savings Bank, 298 Ill. App. 17; Zandstra v. Zandstra, 226 Ill. App. 293, 305; Herrington v. McCollum, 73 Ill. 476.

Certain defendants have made a motion to dismiss the appeal because notice of appeal was not served upon Felix Pieczynski and Casimir Pieczynski, two of the defendants and heirs of the decedent, and because notice of appeal from the order of dismissal entered May 11, 1943 was not served within 90 days from the entry of the order. This motion was reserved, and is now denied. The interests of the two defendants not served with notice of appeal appear to be identical with those of the plaintiff, and they are not parties "who would be adversely affected by any reversal or modification of the order" appealed from, and service of notice on them is not required by rule 34 of the Supreme Court. Chicago Cosmetic Co. v. City of Chicago, 374 Ill. 384. Notice of appeal from the order refusing to vacate the order of dismissal was given in apt time, and a reversal of this order will carry with it the vacation of the order of dismissal.

The cause is reversed and remanded with directions to vacate the order of dismissal and to proceed to a determination of the cause upon the merits.

REVERSED AND REMANDED WITH DIRECTIONS.
O'Connor, P.J., and Matchett, J., concur.

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many of the order of the court, the court has failed to
attention to the fact that the order is not a final order.

position and position in regard to the fact that the order is not a final order.
In this the court says, "The court cannot say that the order is not a final order."
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43063

CHATFIELD MANOR, INC,
a corporation,
Appellee,

v.

SAM ROSEMAN,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

323 I.A. 650

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in a forcible detainer action awarding plaintiff possession of apartment 302 in plaintiff's building occupied by defendant under a month to month tenancy, on the ground that defendant was maintaining a nuisance in the apartment in that his wife, who had been suffering from an organic brain disease for about 25 years, by hysterical screaming and crying disturbed other tenants of the building. The case was tried before the court without a jury. The evidence on behalf of the plaintiff, if accepted as true, establishes a nuisance (Hall v. Putney, 291 Ill. App. 508), and in our opinion justifies termination of the tenancy.

The remaining question presented is whether or not the finding of the trial court is against the manifest weight of the evidence. Defendant had been a tenant of the building for approximately 4 years. During the first two years he occupied an apartment on the seventh floor, and then moved to apartment 302 on the third floor. Mrs. Jones, occupant of apartment 304, testified that during the time the Rosemans lived in apartment 302 she heard at intervals, daily and all day long, excruciating screams that affect people's nerves; that in the colder weather when the windows are closed she does not hear the noise quite so much unless

CHARTERED BY THE
GOVERNMENT OF THE
INDIAN TERRITORIES

AND
THE
NORTH-WEST TERRITORY

THE
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1880-1881

THE GOVERNMENT OF THE INDIAN TERRITORIES

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1880-1881

THE GOVERNMENT OF THE INDIAN TERRITORIES

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CHARTERED BY THE GOVERNMENT OF THE INDIAN TERRITORIES

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she happens to be in the bedroom. Mrs. Siegal, wife of the manager of plaintiff's property, occupied apartment 402, right above 302, for 3 years. She testified that practically every day she heard crying and screaming in 302, at night as well as during the day. A switchboard operator, who had worked on alternate day and night shifts for a year and a half, testified to having heard screaming from 302 around Labor Day, 1943, lasting from 3 to 5 minutes; that she heard similar noises 3 or 4 other times. A night clerk, who had been in the employ of plaintiff for approximately a year, testified to having heard this screaming and yelling for a period of nearly 5 minutes on one occasion in January 1943. Plaintiff's manager testified that he talked with defendant several times, requesting him to move because of complaints of tenants on account of the noise coming from defendant's apartment.

A nurse employed by the defendant for about 9 months before the trial testified that she was constantly with Mrs. Roseman, who behaved very nicely - almost like a normal person when you treat her properly; she laughs a great deal, does not yell or make any loud noises any more, and for the last 6 months has been perfectly quiet and normal; that a little while after the witness came to her employment the manager came to the apartment when Mrs. Roseman was having a spell, was nervous and was screaming; that Mrs. Jones did not knock on the door many times, but maybe once or twice. The defendant testified that the manager of the building never spoke to him about his wife or complained about noises; that in 1942 an attempt was made to raise his rent from \$81 to \$83 a month and he, refusing to pay, appealed to the O. P. A. and was sustained; that in August 1943 he went to the O. P. A. to compel plaintiff to clean the apartment; that the next day or a few days thereafter he got a notice to move. The manager of the building testified that he did not know the defendant had been

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to the O. P. A. until he heard the testimony on the trial. The only notices served on defendant appearing in the record are dated September 28, 30, and October 21, 1943.

The trial court had the advantage of observing the witnesses and hearing them testify. We cannot say that his finding is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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to the U. S. A. until he heard the testimony of the jury. The only notice served on defendant was on the 1st day of

March 1902, and on the 1st day of March 1902.

The trial court has the advantage of knowing the witnesses

and hearing them testify. It is not an easy thing to

against the evidence of the witnesses.

The judgment is affirmed.

RECORDED.

Witness: J. H. Gorman, J. H. Gorman, J. H. Gorman.

43006

FRANK MARSHALL,
Appellee,

v.

WALTER J. CUMMINGS, as Receiver, etc.,
et al., doing business as CHICAGO
SURFACELINES,
Appellants.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

3281A. 650²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of \$1500, entered on the verdict of a jury in an action for personal injuries.

On December 5, 1942, at the intersection of Cicero and Fullerton Avenues, at about noon, plaintiff was struck and injured by one of defendants' cars, northward bound on Cicero Avenue, a public highway which runs north and south. Fullerton Avenue, running east and west, intersects Cicero at this point. Two lines of street cars run on each street. A plat of the intersection is in evidence. Movements of the cars were controlled by "stop and go signals," (green and red) the green indicating traffic might proceed in the direction indicated, the red that it should stop.

Plaintiff was 69 years of age. He lived at 2534 South 59th Court in the town of Cicero. He worked for the Mills Novelty Company at 4166 West Fullerton Avenue in Chicago. Plaintiff says at the time of the accident he was returning home from his work by usual route. Fullerton Avenue at this intersection is 60 feet wide from curb to curb and 100 feet wide from building line to building line. Cicero Avenue is about 76 feet wide from curb to curb and 90 feet wide from building line to building line. North of Fullerton Avenue and west of the southbound street car tracks

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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and the 20-foot high rock wall in the foreground.

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on Cicero is a safety island 101 feet long and 4 feet 6 inches wide. Plaintiff testified that when he quit work he took the Fullerton Avenue street car and got off at Cicero Avenue. He walked to the sidewalk at the northeast corner of the intersection. He then took a few steps toward the west, stopped and waited for the green light, intending to cross to the northwest corner of the intersection. The next thing he knew he was in the hospital.

Called for re-examination plaintiff said that before he stepped from the curb to the street he looked both north and south, and that looking south on Cicero Avenue he saw a street car on the south side of Fullerton Avenue, standing still. Looking north he did not remember seeing anything. He does not remember what hit him, and plaintiff's attorneys say that the injury he received to his head caused a lapse of memory so that he is unable to recall events from ^{the} time he stepped into the street until he was in the hospital. The theory of his case is that he waited at the curb on the northeast corner of the intersection for the light to change green for Fullerton Avenue; that when the lights changed he stepped off the curb on the crosswalk and started across, but that defendants' street car from the south came through the red light, north, and struck him.

Plaintiff's theory is corroborated by an eye witness. Mrs. Wanda Orlando says at the time of the occurrence she was going to the drug store at the southeast corner of Fullerton and Cicero Avenues. She lived one block west of Cicero Avenue. She walked one block to Cicero, then two and one-half blocks south to Fullerton. This brought her to the northwest corner of the intersection. She says she was standing on the northwest corner of the intersection and waiting for the light to change so she could cross the street. When she got the green light she started across. While the red light was on she noticed defendants' street car went

There is a very large number of people who are interested in the work of the Commission, and who are willing to help in any way possible. It is therefore necessary to have a large number of people who are interested in the work of the Commission, and who are willing to help in any way possible.

[illegible][illegible]

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through the red light. She says, "He started up on the red light. The car started very fast so I went back." She heard "them" say they were going to take the plaintiff to the Belmont Hospital. She also said, "I actually didn't see him get hit," and on cross-examination said she was somewhat confused.

A plat of the intersection, made by an engineer for the street car company, was received in evidence without objection.

For defendant, Geiger, an investigator for the street car company, testified plaintiff told him that he was hit by a south-bound car. Plaintiff and another witness, who says he was present at the interview, deny this.

Mathiesen, passenger on the northbound car, said he was on the platform and that the car stopped at Fullerton for a time, then started up. He did not notice the traffic lights at the time. He says he saw a man step from the curb 25 to 30 feet north of Fullerton and start west from the safety island on the west side of Cicero Avenue; that the motorman rang the gong but the man kept on walking. The power was shut off, the brakes applied. The car struck the man and stopped in 2 or 3 feet. The man walked in a northwest direction, walking right on a slant between the sidewalk and the curb. He says the green light was turned on for the street car, and that when the car was about 50 feet north of Fullerton he saw the green light, indicating the north and south traffic could move. He was on the street car, near the motorman.

Joyce Frizzell, riding on the platform to the left of the motorman, says the car stopped at Fullerton and started up on the green light.

Another passenger who testified was Angela Dolven. She was going to work. She said when the street car came to Fullerton Avenue it stopped for the red lights. It started up on the green light.

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The conductor, Hayes, gave similar testimony. He was sure the car moved only when the green light went on. The motorman gave similar testimony, and Joe Stretchek, a passenger, gave testimony to the same effect.

It is the duty of this court to reverse a judgment entered on the verdict of a jury, which is against the manifest weight of the evidence. Hurds Anno. Stats. Chap. 110, Para. 216, §92, Sub. (3) B. This is a power used with reluctance. It must be exercised here. The plaintiff's own evidence is uncertain and that of the principal witness, who corroborated him, doubtful. The number of witnesses who testify to a given state of facts is not necessarily controlling, but the burden of proof is on the plaintiff to show negligence of defendant and due care by plaintiff. One witness testifies the car started on the red light; five witnesses testify to the contrary. The five narrate the more reasonable and probable account of what occurred, although some of them are not consistent in their testimony.

The defendants complain that the court refused to give their requested instruction No. 4. The instruction was argumentative and would only have tended to confuse. The issues in the case were simple. Less rather than more instructions would have been helpful to the jury,

For the reason that this judgment is manifestly against the weight of the evidence it will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Niemeyer, P. J., and O'Connor, J., concur.

The Committee, after a long and careful consideration, has decided to recommend that the Government should take steps to improve the position of the Indian population in the North-West Frontier Province.

It is the duty of the Government to ensure that the Indian population in the North-West Frontier Province should be able to enjoy the same rights and privileges as the other subjects of the British Empire.

The Committee has also recommended that the Government should take steps to improve the education of the Indian population in the North-West Frontier Province.

The Committee has also recommended that the Government should take steps to improve the health of the Indian population in the North-West Frontier Province.

The Committee has also recommended that the Government should take steps to improve the economic position of the Indian population in the North-West Frontier Province.

The Committee has also recommended that the Government should take steps to improve the social position of the Indian population in the North-West Frontier Province.

The Committee has also recommended that the Government should take steps to improve the political position of the Indian population in the North-West Frontier Province.

The Committee has also recommended that the Government should take steps to improve the cultural position of the Indian population in the North-West Frontier Province.

43018

FARM FOOD STORES, INC., a
corporation,

Appellant

v.

ESTHER WADLER MILLER,
Appellee.

323 I.A. 551

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The sheriff, under an execution issued in favor of Esther Wadler Miller against Herman Wadler, levied on a Packard coupe of a value of about \$1,000. Plaintiff corporation claimed the coupe as its own property. The cause was tried by jury, which returned a verdict finding the issues for respondent and that the automobile was the property of the judgment debtor. Plaintiff appeals.

Anita Wadler is the second wife of Herman Wadler, she is also the secretary of the plaintiff corporation. She testified for the plaintiff, her evidence tending to show that the Packard coupe was a 1942 model purchased by plaintiff from the Packard Motor Car Company in December, 1941, that the price paid for it was \$750 in cash and a 1940 model Packard coupe owned by the plaintiff and given in trade as part of the consideration.

A certified copy of the application for license by the corporation was offered in evidence. It shows the sale of the Packard car by the Packard Motor Car Company to plaintiff on December 2, 1941, the registration of the same with the secretary of state by plaintiff and the issuance to plaintiff by the secretary of state of the usual certificate of title, which is No. 1640708.

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The car was taken by the deputy of the sheriff from in front of plaintiff's place of business at 6520 South Cicero Avenue. Herman H. Wadler, the judgment debtor, called as a witness testified he did not own the car levied on. The point is made in this court for the first time by defendant that the name of the plaintiff corporation is Farm Foods, Inc. instead of Farm Food Stores, Inc. The point was not raised in the trial court either by motion or objection and, of course, cannot be raised here. The evidence shows the plaintiff operates several stores under the same name. The leases are in evidence and all executed in the name of the plaintiff corporation. The deputy sheriff, who levied on the coupe, testified that when he went to 6520 South Cicero Avenue to take possession of the car, it was standing in front of plaintiff's place of business at that number. The keys were not in the car. The deputy afterward got these from his partner.

Herman Wadler is vice-president of the plaintiff corporation. When it was first organized he was the president. Anita Wadler is secretary and treasurer. Harley Morgan, her father, is now the president.

Herman Wadler by his marriage with defendant, Esther Wadler Miller, has a daughter, Leona Jean Wadler, who is the principal witness for the judgment debtor. She had a brother named Seymour, son of Esther and Herman, who was a sergeant in the Army and was killed in an air accident when about nineteen years of age. Leona Jean says that when she heard her brother was killed she called up her father. It was on a Sunday, about eight o'clock in the evening. She was waiting for her father outside her house, when he drove up in a car and opened the door for her. She says they both had lumps in their throats. She mentioned the car. She says she said, "This is a nice car". He said: "Yes, Anita and I both traded our car in". I said: "Just think, if Seymour were alive now, you would give him your car", and he said "yes". That was

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all that was said about the car." She says that she was referring to the new car, the Packard, that her father was sitting in it at the time it was parked in front of their house, where he had come to talk with her.

This is substantially the evidence offered tending to show that the title of the car was in Herman Wadler personally and not in the corporation.

Herman Wadler was called as a witness and positively denied that he was the owner of the car. We hold the evidence establishes without substantial conflict that the title to the car is in the plaintiff company and that the judgment must be reversed for that reason.

The testimony of Jean as to her conversation with her father at the time of Seymour's death hardly rises to the dignity of an admission in regard to the title of the automobile. They were speaking of their sorrow at Seymour's death not about the question of who had title to the car. Winslow v. Cooper, 104 Ill. 235, 240; Schwachtgen v. Schwachtgen, 65 Ill. App. 127, 129; Bragg v. Geddes, 93 Ill. 39. Defendant points out many reasons why a jury might have surmised something about the ownership of this car, but there is no evidence in the record which would justify a conclusion that the judgment debtor was the owner.

There was also error in defendant's given instruction No. 5, by which the jury was told that if it should find any witness who testified falsely "to any material matter", it might entirely disregard his evidence except as far as corroborated, etc. This instruction has been held erroneous in People v. Flynn, 378 Ill. 351; People v. Wells, 380 Ill. 347.

Because there is no evidence to sustain the judgment entered it will be reversed.

REVERSED.

Niemeyer, P.J., and O'Connor, J., concur.

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101; Smith v. Smith, 101 F.2d 101.

It is not possible to determine the exact date of the first meeting of the committee, but it is believed that it was held in the latter part of 1941 or the beginning of 1942.

43047

WILLIAM MAZANEC,
Appellee,

v.

ROBERT A. PROSSER,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 652

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Mazanec was severely injured at about 11:00 P.M., March 27, 1943, when he was walking across Ogden Avenue at or near its intersection with 31st Street in the City of Chicago. He was struck by an automobile driven by defendant in a south-westerly direction.

Mazanec filed suit against Prosser and the Illinois Clay Products Company, by which Prosser was employed. The action was dismissed as to the corporation. The issues between plaintiff and defendant were submitted to the jury. It returned a verdict of guilty, with damages assessed at \$40,000.00. Defendant's motion for a new trial and for judgment notwithstanding the verdict was denied and judgment entered for plaintiff, from which defendant appeals.

It is contended for reversal that plaintiff was guilty of contributory negligence as a matter of law; that plaintiff failed to prove defendant guilty of any negligence; that the court erred in giving plaintiff's instruction No. 3; that the verdict of the jury was excessive, indicating passion and prejudice, and that for these and other reasons defendant was entitled to a new trial.

A blueprint of the intersection of 31st Street and Ogden Avenue is in the evidence. 31st Street runs east and west. It is 42 feet wide from curb to curb. Ogden Avenue intersects 31st

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street at an angle. It runs from northeast to southwest. It is 58 feet wide from curb to curb. The planogram of the intersection was by agreement marked at the four corners by the letters A, B, C, and D, A representing what would usually be called the northwest corner, B the northeast corner, C the southeast corner, and D the southwest corner of the intersection. The traffic was controlled by red and green lights. The blueprint is drawn to a scale of 1 inch to 10 feet. From the northeast corner of the intersection to the southeast corner of it the distance is 111 feet. From corner C to corner A is 64 feet.

Defendant was called as a witness under Section 60 of the Civil Practice Act. He said that he was 34 years of age; that at the time of the accident he was driving a 1941 Chevrolet coupe, which belonged to his employer, the Illinois Clay Products Company, and that the coupe had been assigned to him either for business or pleasure; that the license was issued to the company. He lived in LaGrange. On this particular evening he left home about 7:30 P.M. and drove to the airport to meet personal friends coming from Youngstown, Ohio. They were friends and also customers. He met them and drove them to the Drake Hotel. He left them at the hotel about 10:15 P. M. He then drove down Ogden Avenue on his way home. There was no traffic or automobiles ahead of him. He drove southwest toward his home. He noticed the traffic lights, which when he reached the intersection were green in his favor. He was traveling about 25 miles per hour. He had lights on his automobile which threw a light ahead of his car. He could see the right hand curb of the street as he drove along. He looked straight ahead. There was nothing wrong with his eyesight. He could see ahead 25 or 30 feet. He could stop within a distance of 15 or 20 feet. He did not know which way plaintiff came from nor what way he was crossing the street. The front right bumper and head-

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light of his car struck plaintiff. The glass in the headlight was broken. There was a small dent in the hood. He was conscious of the fact that his auto had contacted something. He was then half way through the intersection in the first lane of traffic. He pulled out of the lane, stopped against the curb, got out of his car and walked backed about 60 or 70 feet to where plaintiff was lying. After the accident he talked to the Cicero police and told them that the light changed as he came up to it, but he was not sure of that.

Plaintiff testified he lived at 1016 West Cullerton Street; that he can neither read nor write; that at the time of the accident he was on the way to his sister's home at 40th Street and Home Avenue in Stickney; that he left his home at 10 o'clock on the evening in question, took Morgan Street south to 22nd Street, then went west on 22nd street to the Western Electric, where he got a bus. He got out of the bus at 31st Street and Ogden Avenue. He saw the bus stop at the stop light and thought that he was at Harlem Avenue and got off. He then found out he was on the wrong street. He waited on 31st and Ogden and was looking east. Before he started to cross the intersection he thought he would take a bus on the other side of Ogden Avenue. He got off at the point marked "B" at the right of the plat. He crossed over to corner "C" at the lower center of the map. Before he started across he looked at the lights. He was looking at the light on "B" corner and before he started the lights were green for 31st street. He says, "I started to cross Ogden from corner 'C' towards corner 'A'." While he was crossing the lights changed to red. He saw an automobile about 100 or 150 feet away, coming toward him. He hustled up and took a couple more steps forward and was hit. He says, "I came to two weeks afterwards in bed at the Berwyn Hospital." His injuries were undoubtedly severe, a matter we shall discuss later.

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Defendant contends that plaintiff was guilty of contributory negligence as a matter of law and relies on the case of Good v. Behrendt, 321 Ill. App. 303, where plaintiff was held barred by negligence as a matter of law. The facts here are quite distinguishable. Unlike this case the traffic there was not controlled by stop and go signs. There were also many other distinguishing facts. The Good case was not intended to change the well established rules of law in this state as to the submission of issues of negligence and contributory negligence to the jury. There is evidence in the record here on both the alleged negligence of defendant and alleged due care of plaintiff which we have not recited. These issues are argued only as matters of law, and from that standpoint we hold both issues were properly submitted to the jury.

It is next urged the court erred in giving plaintiff's instruction No. 3. The instruction was:

"The court instructs the jury that if a person without fault on his part, is confronted with sudden danger or apparent sudden danger, the obligation resting upon him to exercise ordinary care for his own safety does not require him to act with the same deliberation and foresight which might be require under ordinary circumstances."

It is urged the circumstances here did not justify the giving of this instruction. Roberts v. Chicago City Railway, 262 Ill. 228, and Kavanaugh v. Parret, 310 Ill. App. 429, are cited. Defendant says the undisputed evidence here showed there was no emergency, therefore the instruction was inappropriate. Kavanaugh v. Parret was reversed by the Supreme Court in 379 Ill. 273. We think plaintiff had a right to have the jury instructed on his theory of the case. Goldberg v. Capitol Freight Lines, Ltd., 314 Ill. App. 7 affirmed in 382 Ill. 283. The uncontradicted evidence showed the traffic lights changed as plaintiff and defendant other. The question of whether an emergency was the jury.

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The point which has given some serious concern on this appeal is the contention of defendant that the verdict of \$40,000 damages is excessive and indicates prejudice. There is an insinuation in the argument that plaintiff acted a part during the trial, tending to give the jury an exaggerated view of his injuries. The case was tried about seven months after the accident. At that time plaintiff wore one of his partial casts. Defendant says, "During the entire trial the plaintiff lay stretched out full length upon one of the benches in the court room near the counsel table and directly opposite to the jury." Our attention is not called to any place in the record which shows that defendant made any suggestion of objection to this during the trial. Counsel were not without experience.

The evidence shows without contradiction that plaintiff was unconscious after the accident and in a state of deep shock with a rapid and shallow pulse. In the language of the old pleadings his body was bruised and broken. There was a laceration of the scalp about six inches long, a laceration of his right wrist extending from back of the right little finger up into the wrist for a distance of about five inches. The bones of the wrist were visible. There was a compound fracture of the right leg. The bones were sticking through the skin. There was a double fracture of the pelvis on the right side and, according to the medical testimony, a severe cerebral concussion. He was not rational for about two weeks after the injury and medical testimony was to the effect that there was a definite hemorrhage of the brain. The cuts on the head and wrist were sutured and later skeletal traction was applied to the leg.

As already said, the accident happened March 27, 1943. At the time of the trial in October, 1943, the cast was still on plaintiff's leg. He was confined to the hospital for over three months. Many X-ray films were taken and are a part of the record. The circulation of the blood in the right leg in its lower part was largely destroyed

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as a result of the accident. The arteries and veins were torn, some of them completely across. The circulation of blood in the lower two-thirds of the right part of the leg is inadequate and will permanently remain so. The medical testimony for plaintiff tended to show that the brain injury of the plaintiff was permanent. There is as yet only a partial union of the fragments of the tibia. The X-ray films show a definite malalignment of the tibia, which is the weight bearing bone of the lower leg. There was evidence tending to show plaintiff would remain a permanent cripple during the rest of his life.

The simple truth is that if defendant is legally liable the damages are such that they cannot be computed in money. This man is forty-three years of age and has a family. In view of the undisputed facts we cannot say this judgment is too high. It is entered on the verdict of the jury. It is approved by the trial judge. It will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

42974

ELLA R. HOPKINS,
Appellant,

v.

PAUL C. LOEBER, et al.,
Appellees,

JOHN G. PROSS, et al.,
Intervenors-
Cross-Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

3231A. 652

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 13, 1941, plaintiff filed her complaint in chancery against Paul C. Loeber, Charles E. Fox and Albert W. Swayne, individually and as trustees under a declaration of trust dated December 23, 1930, for an accounting, the dissolution of the trust and the appointment of a receiver. After the issues were made up the cause was referred to a master in chancery. He took the evidence, made up his report, recommended the dissolution of the trust; that Paul C. Loeber, one of the trustees, be held liable for his misconduct in what he did as trustee; and that Charles E. Fox and Albert W. Swayne, the other two trustees, be held not liable. Objections and exceptions to the report were overruled, a decree entered in accordance with the recommendation of the master and plaintiff appeals. Paul C. Loeber and certain intervenors filed cross-appeals.

The record discloses that for many years Leight & Company, a corporation, conducted a mortgage business and underwrote a number of mortgage bond issues. Substantially all of the stock of the corporation was held by Edward Leight, Angelina Leight, his wife, and Albert E. Leight, their son, and they were the principal officers and directors of the company. Ella R. Hopkins, plaintiff, and her husband, LaFayette Hopkins, were large investors

ALLA W. HOSKINS,
Defendant,

v.

PAUL C. LARSEN, et al.,
Plaintiffs,

JOHN A. LARSEN, et al.,
Intervenor-
Plaintiffs.

1. THE COURT FINDS THAT THE PLAINTIFFS HAVE PROVEN THAT THE DEFENDANT HAS BEEN GUILTY OF THE FOLLOWING VIOLATIONS:

1. The defendant has violated the provisions of the Act relating to the registration of securities.

2. The defendant has violated the provisions of the Act relating to the disclosure of information.

3. The defendant has violated the provisions of the Act relating to the prohibition of fraud.

4. The defendant has violated the provisions of the Act relating to the prohibition of manipulation.

5. The defendant has violated the provisions of the Act relating to the prohibition of insider trading.

6. The defendant has violated the provisions of the Act relating to the prohibition of false statements.

7. The defendant has violated the provisions of the Act relating to the prohibition of false reports.

8. The defendant has violated the provisions of the Act relating to the prohibition of false information.

9. The defendant has violated the provisions of the Act relating to the prohibition of false advertising.

10. The defendant has violated the provisions of the Act relating to the prohibition of false statements.

11. The defendant has violated the provisions of the Act relating to the prohibition of false reports.

12. The defendant has violated the provisions of the Act relating to the prohibition of false information.

13. The defendant has violated the provisions of the Act relating to the prohibition of false advertising.

14. The defendant has violated the provisions of the Act relating to the prohibition of false statements.

15. The defendant has violated the provisions of the Act relating to the prohibition of false reports.

16. The defendant has violated the provisions of the Act relating to the prohibition of false information.

17. The defendant has violated the provisions of the Act relating to the prohibition of false advertising.

18. The defendant has violated the provisions of the Act relating to the prohibition of false statements.

19. The defendant has violated the provisions of the Act relating to the prohibition of false reports.

20. The defendant has violated the provisions of the Act relating to the prohibition of false information.

21. The defendant has violated the provisions of the Act relating to the prohibition of false advertising.

22. The defendant has violated the provisions of the Act relating to the prohibition of false statements.

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in the securities sold by Leight & Co. The company became financially embarrassed and bankruptcy proceedings were filed in February, 1930, in the United States District Court. The Leights conferred with Loeber, a prominent real estate operator, with a view to making a settlement with Leight & Company's creditors and it was found that from \$200,000 to \$500,000 might be needed for this purpose, a fund of over \$200,000 was raised and the Leights and Loeber agreed that Loeber was to receive 90 per cent of the stock of Leight & Company if Loeber was successful in bringing about the settlement. Loeber was to control the affairs of Leight & Company. March 27, 1930, a syndicate agreement was entered into with the contributors to the fund to which LaFayette Hopkins subscribed \$25,000. Albert F. Madlener, on behalf of his sister Angelina Leight, subscribed \$100,000. Ninety per cent of the stock of Leight & Company was delivered to Loeber and December 23, 1930 the declaration of trust was drawn up in which it is recited that Leight & Company transferred and assigned to the three trustees all of its property of every kind and nature; that the trust was created for the purpose of carrying on and liquidating the business of Leight & Company; that it was proposed that the entire beneficial interest in the proceeds and avails of the trust property should be vested in the beneficiaries of the trust who should, from time to time, hold certificates of interest divided into three classes, A, B, and C; that the trust was approved pursuant to the composition order entered in the bankruptcy proceeding.

By the declaration of trust the three trustees would hold in trust, mortgage, control and dispose of the property, all to be in trust for specified purposes. The trustees were given broad powers and they were to act without bond. Article 3 provided: "The beneficial interests in this trust shall consist of three classes, designated respectively Class A, Class B, and Class C beneficial

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interests. The total number of beneficial interests which are authorized hereunder shall be two thousand (2,000) Class A beneficial interests, twenty thousand (20,000) Class B beneficial interests and one thousand (1,000) Class C beneficial interests. Class A beneficial interests shall be of the par value of \$100.00 each; Class B beneficial interests shall be of the par value of \$100.00 each, and Class C beneficial interests shall have no par value. ***

"The holders of Class A beneficial interests shall be entitled to receive out of earnings or profits of the trust estate cumulative distributions in the amount of six (6) dollars per interest per annum as aforesaid, and of all unpaid delinquent cumulative distributions to the holders of Class A beneficial interests." The trustees may, if they see fit, distribute out of the earnings or profits pro rata among the holders of Class A until such holders were paid in full.

"Upon the payment in full of the par value thereof to the holders of Class A certificates and the cancellation thereof *** all sums which the Trustees thereafter shall see fit to distribute, *** shall be distributed pro rata among the holders of Class B certificates in proportion to their respective holdings thereof until the holders of Class B certificates shall have received the full par value thereof. Before making final payment on account of the par value of Class B certificates, the Trustee shall require the surrender of such certificates for cancellation. The Trustees shall have the right at any time, whether or not Class A certificates shall have been paid in full, to redeem all or any part of the Class B certificates at any time outstanding by delivering to the holders thereof defaulted securities of the trust estate on a par for par basis, that is to say, \$100.00 par value of such defaulted securities in exchange for each \$100.00 par value Class B beneficial interests, provided, however, that such redemption shall

The total number of scientific instruments...
 authorized personnel shall be the number (2,000) of...
 scientific instruments, being...
 authorized personnel and the number (2,000) of...
 instruments, being...
 of Class A scientific instruments shall be...
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be made only with the consent of the holders of Class B certificates sought to be redeemed. Provided, also, that no Trustee or Trustees shall have the authority or right to exchange any Class B certificates owned or held by him individually or his assignees for any such defaulted securities or property of the estate." Then follows a provision that after the payment of Class A and Class B, if any proceeds remain, they shall be divided pro rata among the holders of Class C. In Article 5 it is provided: "Each of the Trustees shall be responsible only for his own willful breach of trust and not for the act or omission of any other Trustee." Other provisions follow, one of which is that the trust agreement may be amended, modified or revoked by the joint action of the trustees and a majority of the certificate holders and that "This agreement and the trust hereby created shall in any event terminate at the expiration of 20 years from the date hereof."

The petition filed in the bankruptcy proceedings, asking for a composition, was referred to a referee in bankruptcy who, after hearing, recommended that the composition be accepted and approved. In the petition it was averred that the 10 per cent was to be paid to the unsecured creditors of Leight & Company. Objections to the report of the referee were overruled, the report approved and an order of composition entered by the bankruptcy court. By the order it was found that Leight & Company had executed an instrument of assignment, transfer and delivery to "Loeber, Fox and Swayne, as Trustees under a trust agreement bearing date of December 23, 1930, the entire right, title and interest of the alleged bankrupt in and to all the property and assets of every kind of the estate of the alleged bankrupt." That a duplicate of the original declaration of trust had been filed with the clerk of the United States Court and that it had been approved by the court and by the trustees. "It was further ordered that the execution by the Trustees of the declaration of trust filed with the Clerk of the Court be and the

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be made only after the consent of the holder of the property...
...or the holder of the property...
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...Declaration of trust...

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same was in all respects confirmed and approved."

agreement
A syndicate/ dated March 27, 1930, which was signed at different times by the parties who contributed to the funds of over (\$200,000), above mentioned, recited that "it appears to be necessary that a large amount of cash funds be provided and made available in order to protect and save the estate of Leight & Company from the excessive expense, waste and dissipation usually resulting from involuntary bankruptcy or insolvency proceedings, and to protect the interests of creditors and other persons to whom said Leight & Company is indebted *** and to protect the interests of the stockholders of said corporation from complete loss, and said stockholders are without sufficient means or are otherwise unable to provide such necessary cash funds." And it was proposed that the cash fund of \$200,000 to \$500,000 be placed in the hands of "Paul C. Loeber, as financial Trustee, party of the second part herein, for the purposes above indicated and herein-after more fully set forth." The agreement then continued that in consideration of the premises, etc., the subscriber, the party of the first part, "does hereby promise and agree to pay to said Paul C. Loeber, party of the second part" from time to time the amount subscribed by the several subscribers upon condition that 90 per cent of the stock of Leight & Company be deposited with Loeber under the "Stock Deposit Agreement" and upon the further condition that this \$200,000 be subscribed. That the sums paid by the subscriber "are to rest in the hands of the said Paul C. Loeber, as Financial Trustee *** with full and irrevocable authority to use and apply the same, according to his individual discretion" as in his judgment might save the estate from waste and dissipation, and to liquidate Leight & Company as economically and as soon as may be done. That neither Leight & Company nor its stockholders or creditors have any claim to the fund, "and the same shall be subject only to appropriation and disposal by

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said Paul C. Loeber as the Financial Trustee." The syndicate agreement continued: "The object of this agreement is to accomplish the orderly, expedient and economical liquidation" of Leight & Co., "and the payment in full of all its just debts" as promptly and expeditiously as practicable "through the management and proceedings of Paul C. Loeber duly constituted the 'Financial Trustee' and the 'Stock Trustee' respectively and separately, *** and the funds hereby provided shall be at his disposal in his own discretion and judgment" to pay all debts and all expenses of Leight & Co. in the liquidation of the corporation. That "The corpus of the estate of Leight & Company may be disposed of by" Loeber "in whole or in any part *** in any manner at his own choice and discretion." Then follows paragraph 7, in which it is stated that it is the intention of the agreement that all debts, present and future, and all obligations and expenses of the corporation shall first be paid and secondly, that the subscribers to the agreement "shall be duly and ratably reimbursed for all funds advanced by him and them respectively to the Financial Trustee" and the residue of the estate of the corporation if any, shall be divided one-half to the financial trustee to be distributed by him pro rata to the subscribers in proportion to the respective amounts which each contributed, "one-quarter to the Financial Trustee in his own right as his special and final compensation; and the remaining one-quarter to the Stock Trustee under said Stock Deposit Agreement, to be distributed by him."

Sometime after the syndicate agreement was signed by Madlener, who, as above stated, contributed \$100,000 to the fund in behalf of his sister, Mrs. Leight, Loeber and the Leights met, and the evidence is to the effect that Loeber said that he could not go through with the syndicate agreement with the Leights because an examination of the assets and liabilities

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of Leight & Co. showed that he would receive little for his services. And the evidence is further to the effect that Loeberbalso discovered, as found by the master that the affairs of Leight were conducted dishonestly; that the Leights misapplied the trust funds without disclosing the fact to the investors; that Loeber had informed the Leights he had consulted a noted criminal attorney and that some of the creditors had dangerous claims, and that the C stock which he was to receive as compensation under the syndicate agreement was worthless and that he would resign unless he received additional compensation. And it was agreed that the Leights assign to Loeber their A certificates for \$100,000 which had been issued to them for the \$100,000 deposited under the syndicate agreement, and that the claims of the Leights against Leight & Co. amounting to \$348,622.23 would be assigned by the Leights to Loeber. This was afterwards done.

The Leights' claim against Leight & Co, was filed and allowed in the bankruptcy court and Loeber received under the order of composition 10 per cent of the amount of this claim or \$34,862.22 and he also received 90 per cent of the B stock which otherwise would have gone to the Leights. The Leights further agreed to and did assign to Loeber bonds of the Harvey Hotel Corporation of the face value of \$40,000 which was also part of Loeber's compensation.

There was further evidence and the master found and the decree sustained the finding, that on August 18, 1930, Loeber entered into an agreement with Louis F. Harvey, who had threatened criminal action against Albert E. Leight on account of what had been done in connection with the business of Leight & Co., whereby it was agreed that after the composition and declaration of trust had been approved by the bankruptcy court, Loeber would issue to Harvey in exchange for his Class B certificates defaulted bonds and coupons of the trust estate. That Loeber did not apprise plaintiff, Mrs. Hopkins,

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or her husband, of the threatened criminal action against the Leights or of the additional compensation Loeber was to receive, or of the exchange above mentioned, with Harvey. The master found and his finding was approved, and it was decreed that Loeber was liable for \$34,862.22; that the B certificates which were given to him, being 90 per cent of the Leight claim of \$348,622.23, be held to belong to the Trust estate and that the \$40,000 bonds of the Harvey Hotel were decreed also to be property of the estate. Loeber was also decreed to pay to the estate \$2,643.60, which sum the master found he had misappropriated from the trust funds to his own use.

The record is voluminous, consisting of 4 volumes and a volume of exhibits which contains exhibits too numerous to mention. Numerous briefs have been filed by the several parties, some of which are so lengthy and complicated as to be of no assistance to the court. This is especially true as to the briefs filed on behalf of Loeber. The same is true as to the abstracts 3 have been filed. The "Abstract" prepared by plaintiff's counsel is 161 pages and an "Additional Abstract" by Loeber's counsel of 239 pages and a "Second Additional Abstract" by counsel for Loeber of 8 pages.

We think Loeber should not be held liable for the \$34,862.22. There is no contention, so far as we have been able to discover, that the Leights did not have valid claims against Leight & Co. of \$348,622.23, in fact the master so found and their claims were allowed for this sum in the bankruptcy proceeding. In view of this fact, it is clear that if the Leights had not assigned this claim to Loeber they would have been entitled to receive 10 per cent of it under the order of composition entered in the bankruptcy proceeding, so that neither plaintiff nor any creditor of the Leight estate was in any way injured. For the same reason we are

to his own use.

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of opinion that the B certificates issued for the balance of the Leights' claim cannot be complained of by plaintiff since they in no way diminished the assets of the estate.

The master found that on August 18, 1930, Loeber entered into an agreement with Louis F. Harvey who threatened criminal action against Albert E. Leight, whereby Loeber agreed that after the approval of the composition and the declaration of trust by the Federal court, Class B certificates would be issued to Harvey for which Loeber would exchange defaulted bonds. (Loeber testified that Harvey was opposed to the composition and finally agreed to waive his 10 per cent in cash and take B certificates provided he could exchange his B certificates for defaulted securities; that this was one of the conditions which Harvey and his lawyers imposed in the trust agreement; that it was agreed upon two or three months before the composition. So far as the record shows, this was a secret arrangement.) This agreement was carried out. The three trustees issued to the Harvey Hotel Company three B certificates aggregating \$194,658. These were afterward exchanged by Harvey for defaulted bonds aggregating \$155,351.74, which together with interest thereon at the time of the exchange amounted to \$173,044.03.

Defendants contend that this exchange was authorized by the express terms of the declaration of trust, from which we have above quoted, which provide that the trustees had a right to make such exchange. That they were advised by their counsel that they were authorized to make such exchange, and further, that the trustees on January 21, 1931, passed a resolution specifically authorizing the exchange. We think this contention cannot be sustained. The

trustees did not have the absolute right to make such an exchange - they should have taken into consideration the value of the defaulted securities and not the face value - they were required to exercise their discretion and Fox and Swayne were not warranted in delegating the right to exchange to Loeber. It was their duty as trustees to see that the holders of Class A beneficial certificates were not prejudiced by the exchange. We think this is the true interpretation of the declaration of trust when considered in its entirety. It expressly provides that Class A certificates should be paid in full before any payment should be made to the

of opinion that the certificate issued for the balance of the
debt, which cannot be completed by the certificate since that is
no way diminished the assets of the estate.

The master found that on March 12, 1930, the master entered

into an agreement with Louis J. Harvey and the trustees of the

trust, whereby the trustees agreed that they would

approve of the constitution and the declaration of trust of the

trust, which the trustees had agreed to accept for the

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of opinion that the B certificates issued for the balance of the Leights' claim cannot be complained of by plaintiff since they in no way diminished the assets of the estate.

The master found that on August 12, 1930, Loeber entered into an agreement with Louis F. Harvey who threatened criminal action against Albert E. Leight, whereby Loeber agreed that after the approval of the composition and the declaration of trust by the Federal court, Class B certificates would be issued to Harvey for which Loeber would exchange defaulted bonds. This agreement was carried out. The three trustees issued to the Harvey Hotel Company three B certificates aggregating \$104,855. These were afterward exchanged by Harvey for defaulted bonds aggregating \$155,551.74, which together with interest thereon at the time of the exchange amounted to \$173,044.03.

Defendants contend that this exchange was authorized by the express terms of the declaration of trust, from which we have above quoted, which provide that the trustees had a right to make such exchange. That they were advised by their counsel that they were authorized to make such exchange, and further, that the trustees on January 21, 1931, passed a resolution specifically authorizing the exchange. We think this contention cannot be sustained. The trustees did not have the absolute right to make such an exchange - they should have taken into consideration the value of the defaulted securities and not the face value - they were required to exercise their discretion and Fox and Wayne were not warranted in delegating the right to exchange to Loeber. It was their duty as trustees to see that the holders of Class A beneficial certificates were not prejudiced by the exchange. We think this is the true interpretation of the declaration of trust when considered in its entirety. It expressly provides that Class A certificates should be paid in full before any payment should be made to the

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holders of Class B certificates. In Article 3 of the declaration it is provided: "Upon the payment in full of the par value thereof to the holders of Class A certificates and the cancellation thereof as aforesaid, all sums which the Trustees thereafter shall see fit to distribute, whether out of earnings or profits **** shall be distributed pro rata among the holders of Class B certificates in proportion to their respective holdings." And it is further provided that after the payment in full of the Class B certificates, any assets remaining should be turned over or paid to the holders of Class C. In this connection Mr. Fox testified that when their attorney gave his opinion as to their right to make the exchange of securities for B certificates, the attorney was merely giving his opinion as a matter of law on the terms of the trust agreement. That the trustees, before passing the resolution, January 21, 1931, discussed the question of exchange and "it was the understanding of Mr. Swayne and myself that the value would be measured in the benefits to the Trust and we did not depend for that on" the attorney's opinion; that of course the trustees had to keep in mind the nature of the exchange - the relative value of these bonds.

We think Fox and Swayne should have been more careful. They were parties defendant in a suit in chancery brought in 1931 in the Superior court of Cook county by the Leights against Loeber and it appears from Loeber's answer filed in that case, March 7, 1932, which was introduced in evidence by counsel for plaintiff in the instant case, that the Leights claimed that the agreement entered into between them and Loeber, whereby they assigned their interest in their claims, etc., against the Leight corporation, above referred to, should be set aside for matters they charged against Loeber in that connection. It also appears from Fox's testimony that in 1933 he wanted to start proceedings against Loeber for what he was doing in the administration of the trust

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involved in the instant case and that Swayne, about that time, also was of the same opinion. But they did nothing. These are additional reasons why we think Fox and Swayne should be held liable for what was done after December 23, 1930, the date of the declaration of trust.

Counsel for Loeber contends that the decree entered in the Leight case, brought against Loeber and the other two trustees, is res judicata of the issues involved in the case before us. There is no merit in this contention. Neither the decree nor the pleadings in that case are in the record before us.

We hold the trustees were not warranted in making the exchange without taking into consideration whether such exchange would be of benefit to the holders of A certificates and that trustees Fox and Swayne were not warranted in authorizing the trustee, Loeber, to exchange such securities as he saw fit. The trust agreement, approved by the Federal court, gave the power to the three trustees and not to any one of them.

Grace C. Gilleland and others filed an intervening petition in which it was alleged that she was the owner of a judgment obtained against Loeber, and September 21, 1941, Loeber assigned 150 shares of Class A certificates to her without notice that Loeber's title to the certificates was questioned and that later she assigned some of the certificates to the other intervenors. On May 20, 1941, an order was entered in the instant case restraining Loeber and all other persons who were directly or indirectly interested in the assets or property belonging to the trust estate, from encumbering, transferring, assigning or negotiating any of the assets of the estate. Obviously Loeber violated the injunctive order when he assigned the shares. His violation was for the trial judge if the matter were brought to his attention. The intervenors had no notice of this restraining order and therefore the title of the intervenors was not affected, but since we have above

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held that Loeber's title to the A certificates was good, plaintiff is in no position to complain, and what we have said in this respect is applicable to the intervening petition filed by John G. Pross. Furthermore, in his petition Pross averred that he was a partner of Loeber and that Loeber was indebted to him, and in full settlement of such indebtedness Loeber assigned 117 1/2 A shares, and that afterward Loeber assigned 50 other A certificates. The master found that the testimony of Pross was very vague, indefinite, inconsistent and unconvincing. That the certificates remained in Loeber's vault to which he and Pross had access; that he never attempted to obtain any new certificates and that the evidence as to Loeber's indebtedness to him was apparently not sustained -- that Pross did not obtain the certificates for a valuable consideration. And the master recommended that the assignment by Loeber to him should be held null and void. We are unable to say that the finding of the master that Pross did not give a valuable consideration, or in fact any consideration, for the certificates is not warranted by the evidence. But on the contrary, we are of opinion that the evidence sustains this finding of the master. It follows that these certificates claimed by Pross are the property of Loeber and may result in some benefit to plaintiff when the accounting is made as to the value of the securities in exchange for B certificates.

Counsel for plaintiff further contend that all of the trustees "should have been held liable for wasting of the assets during their management for the past 10 years and Fox and Gwayne were liable after they ascertained in 1933 that the capital was being eaten up by the expenses and stood by and permitted the capital to be eaten up so that from securities in excess of \$1,500,000.00 valued at least over \$500,000.00, the estate dwindled to \$31,000.00." In support of this counsel discuss and argue the

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manner in which the Cass street building and other properties were handled by the trustees. We have considered this argument and are of opinion that, keeping in mind the great depression of which we take judicial notice, which began in 1929 and continued for a number of years afterward, we would not be warranted in disturbing the finding of the master, approved by the chancellor, on this phase of the case. The finding was that they were not liable in this respect.

The master in his 62nd finding said: "There is insufficient evidence in the record to establish the value of the defaulted bonds and coupons of the trust exchanged with Harvey for Class B certificates." And he recommended that a re-reference be had "for the purpose of determining the loss sustained by the trust estate as a result of the exchange of Harvey's Class B certificates for defaulted bonds and coupons of the trust."

The decree of the superior court of Cook county is affirmed in part, reversed in part and remanded for further proceedings in accordance with the views stated in this opinion.

The court costs of the appeal are to be divided, one-half to be paid by Loeber and the other half divided equally between plaintiff and Fox and Swayne.

AFFIRMED IN PART REVERSED IN PART AND
REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and Matchett, J., concur.

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EDMIERS' MOTOR SERVICE, INC., a
Corporation,

Appellee,

v.

WALTER J. CUMMINGS, as Receiver,
etc., et al., doing business as
CHICAGO SURFACE LINES,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 953

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover for damages sustained when one of its northeast bound trucks on Archer avenue collided with the right front door of a Wentworth avenue street car which was turning south into Wentworth avenue from Archer avenue about 10 o'clock in the morning of June 27, 1942. The jury found in favor of plaintiff and fixed the amount of damage to the truck at \$1250. Judgment was entered on the verdict and defendants appeal.

The record discloses that on the morning in question plaintiff's chauffeur was driving one of its trucks which when empty weighed about 16,000 pounds. It was carrying at the time, a load of from 5 to 6 tons of crushed stone and was being driven northeasterly in Archer avenue which extends northeast and southwest. At that time one of defendants' street cars was going southwest in Archer avenue on which there are two street car tracks and as it was turning south into Wentworth avenue, a north and south street, the left front side of the truck struck the right front corner of the street car, throwing the rear end of the street car off the track. The truck was badly damaged and suit was brought to recover for this damage.

Plaintiff's theory of the case is that its truck was being driven at about 5 miles an hour in the southerly street car track as it approached Wentworth avenue from the southwest. That the

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street car, which was on the northerly track traveling at a speed of about 20 miles an hour, did not stop but turned to the south to go into Wentworth avenue; that the driver of the truck in an endeavor to avoid a collision, turned his truck towards the south when the collision occurred. On the other side, defendants' theory is that the street car stopped at the safety island which was north of the northerly track, the regular stopping place, to discharge passengers. It then started up and again stopped at the switch before turning into Wentworth avenue. That the street car gong was sounded and it proceeded to round the curve at a speed of about 5 miles an hour and after traveling about 90 feet on the curve, the truck struck the front door of the right side of the street car with sufficient force to derail the car and wreck the truck; and that there was no evidence that the driver of the truck used any care whatever to avoid the collision until it was too late.

Defendants contend that the court should have directed a verdict at the close of all the evidence as requested by them. The driver of the truck did not testify. Lawrence Edmier, plaintiff's president, testified that the man who was driving the truck at the time of the accident had been in plaintiff's employ about 2 years. That he continued to work for the company for about 2 months after the accident; that the last time the witness saw the driver, which was about 3 months before the trial, the driver was supposed to be driving a truck for some government agency and since that time "I have not been able to locate him." The only occurrence witness called by plaintiff was Frank Catania. He testified that he was at the northeast corner of 21st street and Archer avenue at a gas station where his truck was being repaired. That he saw the street car and the truck before the accident; that the street car started to make the left turn to go south in Wentworth avenue and was traveling at a speed of about 20 miles an hour; that it did not

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stop at the safety island which was located north of the northerly track on which the street car was traveling; that when he first saw the truck it was about 50 feet west of Wentworth avenue coming northeast towards him traveling near the south curb. The speed of the truck when he first saw it was from 15 to 25 miles an hour. The truck tried to avoid the street car by turning to the south and the speed of it was reduced; that the motorman of the street car jumped back when the 2 vehicles were about 5 or 6 feet apart; that the street car did not slow down at any time between the time it started to make the turn and the time of the collision; that he heard no gong sounded.

Ole Foster, called by defendant, testified that he was employed at the McCormick International Harvester Company and was riding on the street car, seated in the front seat on the left-hand side of the car; that the car stopped at the safety island and passengers got off the car, the street car then made a left turn to go south into Wentworth avenue; that he did not see the truck at the time the car started from the safety island. That when the street car made the left turn he saw the truck going at a speed of about 30 to 35 miles an hour and then the collision occurred. On cross-examination the witness said he was reading a newspaper just prior to the collision and that the first he knew of any accident was when he heard the crash.

Edgar Young, an employe of Butler Brothers and a former red cap at the Dearborn railroad station, was a passenger on the street car. He was called by defendants and testified that he was sitting in the cross seat near the rear of the street car; that he was not reading a newspaper but watching traffic on Archer avenue. That when the car came to Wentworth avenue it stopped before it made the turn; that he did not remember whether any passengers got off the car. When he first saw the truck it was coming northeast on Archer

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avenue about 200 feet from the street car and he then thought the accident was unavoidable. The street car was just "creeping around" the curve. On cross-examination he testified that when he first saw the truck the street car had almost made a complete turn to the south.

Thomas J. Shanahan, the conductor of the street car, testified that he was in his proper place near the center of the car. The passengers entered at the front and alighted from the door in the middle of the car. That when the street car reached Wentworth avenue it came to a full stop at the island and then started up and proceeded to the electric switch and again stopped before turning south in Wentworth avenue; that when the street car was just turning south he saw the truck 300 or 400 feet towards the west traveling about 38 or 40 miles an hour and when the nose of the street car was starting to make the curve and was between the two street car tracks in Archer avenue, the motorman sounded his gong 6 or 8 times but the collision occurred, as a result of which the street car was derailed.

Nicholas M. Clesen, the motorman of the street car, was at his proper place operating the car. He testified that the street car stopped at the safety island and discharged passengers, then proceeded to the electric switch and again made a full stop; that while it was not necessary to come to a full stop in order to open the switch, if the street car was going too fast when the trolley hit the pan on the trolley wire it would not operate the switch, so he came to a full stop at the switch, to be sure the switch was thrown the right way. That he sounded his gong when he started to turn into Wentworth avenue and saw the truck about 400 feet distant, coming northeast in Wentworth towards the street car. That the truck as it approached swerved to the south, that the street car at that time was going about 5 miles an hour when the collision occurred, the truck striking the right north door of the street car.

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On cross-examination he testified that at the time of the accident he had worked as a motorman 3 months on the extra list.

This is substantially all the evidence as to how the accident occurred. We think it clear from a consideration of all the evidence that the court did not err in overruling defendants' motion for a directed verdict at the close of all the evidence. The jury might believe from all the evidence that the driver of the truck was in the exercise of due care and that the street car was operated in a negligent manner. And we are further of opinion that whether the verdict in plaintiff's favor is against the manifest weight of the evidence, as defendants contend, was also a question of fact for the jury. Their verdict was in favor of plaintiff. They saw and heard the witnesses testify, their verdict was sustained by the trial judge who also saw and heard the witnesses testify. They were in a better position to determine the truth of the matter in controversy than are we sitting in a court of review where we have but the printed page before us. Upon a consideration of all the evidence in the record and the argument of counsel, we are unable to say that the verdict of the jury, approved as it was by the trial judge, is against the manifest weight of the evidence. In these circumstances we are not warranted under the law in reversing the judgment.

Defendants further contend that the court erred in giving plaintiff's instruction 1 and 6. By the first instruction the jury were told that plaintiff must prove his case by a preponderance of the evidence, "This preponderance, however, is not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts." That in determining the question of the preponderance the jury should take into consideration the opportunities of the witnesses, their demeanor while testifying, their interest or lack of interest, etc. In support of their contention that this instruction was wrong, counsel for defendants say that the

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number of witnesses testifying on one side or the other on a material fact is an important element and should have been taken into consideration by the jury in determining the question of the preponderance of the evidence.

By instruction 6 of the jury were told that plaintiff was not required to prove that the driver of the truck was in the exercise of extraordinary care but only ordinary care and that what was ordinary care depended upon the circumstances of each particular case and is "such care as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances." And the argument, in support of defendants' contention that this instruction was wrong, is that the jury might think that by the driver of the truck turning towards the south in an attempt to avoid the collision was sufficient evidence that he was in the exercise of ordinary care. Instruction 1 is not subject to the objection made. Deering v. Barzak, 227 Ill. 71. While this instruction might not be considered technically accurate, as defendants contend, yet we are of opinion that the issues were simple, easily understood by the jury and that it was not so inaccurate as to warrant a reversal of the judgment. We think instruction 6 was not subject to the objection made. The C. & A. R. R. Co. v. Pearson, 184 Ill. 386.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

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FLOYD J. STONER,
Appellee,

v.

HERBERT H. STONER, HELEN STONER
and STONER COMMISSARIES, INC.,

HERBERT STONER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants praying that a decree be entered finding that a restaurant located at 24-28 North Dearborn street, Chicago, be decreed to be a co-partnership owned by himself and his brother, the defendant Herbert H. Stoner, and that he have a judgment against Herbert on a series of promissory notes made by Herbert and payable to plaintiff.

Defendants denied that plaintiff had any interest in the restaurant business but averred that the restaurant was owned solely by defendant, Helen Stoner, the wife of Herbert. Herbert, in his answer, admitted the execution of the notes June 23, 1924, but averred that at the time of the making of the notes he and plaintiff entered into a written agreement whereby plaintiff agreed to vacate a judgment entered in plaintiff's favor and against Herbert in the Common Pleas Court of Cuyahoga, Ohio, for \$54,080, and that the judgment had never been vacated. A further defense interposed was that the notes were barred by the Illinois Statute of Limitations - that the action had not accrued within 10 years before the commencement of the suit. The case was referred to a master in chancery and

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while it was pending before the master, plaintiff filed a reply to the defendant's answer in which he averred that the Illinois Statute of Limitations did not apply but averred that the notes were executed in Cleveland, Ohio and there payable and that the Statute of Limitations of that state was controlling. The master took the evidence made up his report and found that plaintiff had failed to sustain the burden of proof on the question of partnership of the restaurant; that the notes in suit which were of the face value of \$52,360 were given in consideration, among other things, that plaintiff satisfy the judgment entered against defendant by the Ohio court. That the judgment was never vacated, released or satisfied and therefore the notes were "wholly void for failure of consideration" and that the action was barred by the Statute of Limitations. And he recommended that the complaint be dismissed for want of equity. Objections to the report were overruled, which stood as exceptions. September 21, 1943, a decree was entered sustaining the finding of the master as to the ownership of the restaurant but overruling the finding that the notes were barred by the Statute of Limitations and it was decreed that defendant, Herbert H. Stoner, pay plaintiff the face of the notes with interest totalling \$85,335.40. The decree found that the notes were executed and payable in Ohio and that the Ohio Statute of Limitations, which provided that an action might be brought on promissory notes within 15 years, was applicable. It was further found by the decree that at the time the notes were executed by Herbert he and plaintiff entered into a written agreement which, among other things, provided that plaintiff should vacate the judgment entered in the Ohio court in his favor and against Herbert. That this had not been done but that the failure of plaintiff to vacate the judgment constituted only a partial failure of consideration

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and that on July 12, 1943, plaintiff had tendered in open court to defendant a stipulation executed by him stipulating that the Ohio judgment might be vacated and set aside, which tender the defendant refused and declined.

Within 30 days after the entry of the decree, Herbert filed a written motion to vacate and set aside certain findings of the decree on the ground that the Statute of Limitations of Illinois was applicable and not that of Ohio. An order was entered allowing Arnold D. McMahon to appear as associate counsel for defendant and the motion was set for hearing at a later date. November 16, 1943, an amended decree was entered which found that plaintiff was not entitled to any relief as to the partnership in the restaurant business and as to the notes it was found that they were executed and payable in Ohio; that Herbert was absent from Illinois from the date the notes were executed June 23, 1924, until 1936 and was absent from Ohio from 1936 to the date of the filing of the suit. That plaintiff, Floyd, was a resident of Illinois "from and before June 23, 1924" and continuously from that date to the commencement of the suit and therefore the notes were not barred by the Statute of Limitations of Illinois.

Defendant Herbert Stoner appealed from that part of the decree which held him liable on the notes and plaintiff filed a cross-appeal from that part of the decree which found he had no interest in the restaurant business.

Counsel for Herbert contend that the time of limitation for action on the notes is to be determined by the law of Illinois and that under our statute the action was barred, and counsel for plaintiff agree the Illinois law applies. They say: "Upon and after argument on McMahon's motion to vacate the

and that the Government has no intention of making any further attempt to recover the money.

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original decree that was entered *** it was agreed by all of the parties that the Statute of Limitations of the State of Illinois applied, although as a matter of fact in the final analysis it did not make any difference whether the laws of the State of Ohio applied or the laws of the State of Illinois," as under the facts plaintiff would be entitled to a judgment on the notes under the laws of either state.

There are ten notes; all were executed in Cleveland, Ohio, June 23, 1924, made by defendant, Herbert Stoner, and payable to plaintiff, Floyd Stoner. Each contained a power of attorney authorizing confession of judgment after the notes became due. They aggregated \$42,360, and were payable respectively 6, 12, 15, 18, 21, 24, 27, 30, 33 and 36 months after date and that "each note contained an acceleration clause." Counsel for defendant say: "The first note matured" December 23, 1924, and the last June 23, 1927. The present suit was started on August 21, 1940, 16 years and 2 months after the first note matured and 13 years and 2 months after the last matured. Counsel then refer to Sections 16 and 20, of our Statute of Limitations (ch. 83, Ill. Rev. Stats. 1943). Section 16 provides that : "Actions on bonds, promissory notes, *** shall be commenced within ten years next after the cause of action accrued." And §20 provides: "When a cause of action has arisen in a State or Territory out of this State, or in a foreign country, and by the laws thereof, an action thereon can not be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State." It is agreed that no payment or new promise to pay was made.

On the other side, counsel for plaintiff contend that since plaintiff was a resident of Illinois on and prior to the date the notes were executed and continued to reside in Illinois continuously from that time, and since Herbert prior to and at

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the time of the execution of the notes was a resident of Ohio and continued to be a resident of that state until 1936 when he came to Illinois, the right to sue on the notes was not barred, and counsel relies on Section 18 of our Limitations Act which provides: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or return to the state," and therefore the statute did not commence to run until Herbert removed to Illinois in 1936.

Counsel for Herbert contend that the evidence fails to show that plaintiff was a resident of Illinois prior to and at the time of the execution of the notes and that the burden of proof was on him to establish this fact, while on the other hand, counsel for Floyd take the opposite view of the evidence and say that it clearly proves Floyd was a resident of Illinois prior to and at the time of the execution of the notes. We think plaintiff's contention must be sustained.

The evidence is to the effect that prior to 1923, the Stoner Restaurant Company, a corporation, was operating a restaurant in Cleveland. Plaintiff testified: "I owned 50 per cent of the stock. I sold my 50% in June, 1923. Herbert gave me so much in cash and so much in notes. I think the original notes were for \$52,500." That he filed suit against Herbert in Ohio on the balance due on the notes and had a judgment against him; "Then they got into financial difficulties." "Bankruptcy trouble down there. I was in Chicago, they called me down there and Herbert made a deal with the creditors in which they wanted my stock voted out." That Herbert paid him \$10,000 and made out the new notes [the notes in suit.] That plaintiff was not at any of the creditors' meetings in the bankruptcy proceeding. "I lived in Chicago at that time." That plaintiff had the notes in his possession since the time they were executed - June 23, 1924; that he saw his brother frequently between

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June, 1924 and March, 1927. That he never made any demand on Herbert for the payment of the judgment in Cleveland. The witness further testified that after Herbert paid him the \$10,000 and executed the new notes, that Herbert "operated the restaurant alone" in Cleveland. That he was not a party to the filing of the bankruptcy proceedings in Cleveland. "Mr. Horwitz asked me to come to Cleveland. He had me come down there three or four times. I think I saw Herbert every time I was there."

Herbert, on cross-examination, testified that Floyd "was in Chicago and when we had the conference about his judgment in Cleveland I thought he had come to Cleveland for that. I had written him a couple of times prior to that, perhaps April and May of 1924, after he had the judgment against me some time." Counsel for Herbert then quoted the following from the testimony of Floyd: "Q. Have you ever been in the restaurant business in Chicago, before? A. In 1926. Q. How long have you been in the restaurant here? A. It was I believe '31 when I went out. Q. From '26 to '31? A. That is right." And counsel then say: "This testimony would seem to indicate that the trips to Chicago or sojourns therein, prior to 1926, were mere visits to determine its availability as a likely spot for an enterprising restaurateur." Further evidence is quoted from the record, but upon a consideration of all the evidence in the record we are of opinion that the finding of the chancellor to the effect that Floyd was a resident of Chicago, as above stated, is borne out by the evidence. We are further of opinion that the finding of the chancellor that there was but a partial failure of consideration for the notes, in that the Ohio judgment had been released or vacated, and the further finding that during trial plaintiff has tendered to defendant a stipulation that the Ohio judgment might be satisfied, was warranted under Orshel v. Rothschild, 238 Ill. App. 353, and cases to

7.

Miles & Miles, Inc., v. Meyer, 252 Ill. App. 395.

We are further of opinion that upon a consideration of all the evidence in the record and in view of the fact that the master and the chancellor found that plaintiff had not proven his right to a partnership in the restaurant business conducted in Chicago, we would not be warranted in sustaining plaintiff's contention in his cross-appeal.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, P.J., and Matchett, J., concur.

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43032

LAKE VIEW TRUST AND SAVINGS BANK,
a Corporation,

Appellant,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

323 I.A. 654²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$26,507.44, being the amount of interest which accrued on a judgment entered in a condemnation proceeding brought for the widening of north Ashland avenue, Chicago. Judgment for \$153,943 was entered July 26, 1927, in the condemnation proceeding. The face amount of the judgment was paid by the City to plaintiff November 19, 1930.

The instant case was brought December 29, 1933 and plaintiff claims interest on the face of the judgment at 5 per cent per annum from the date the judgment was entered July 26, 1927, until it was paid November 19, 1930. The case was heard before the court without a jury and the interest claimed, which accrued more than 5 years prior to the date of the filing of the suit, amounting to \$10,968.44, the court held, was barred by the 5 year Statute of Limitations and judgment was entered for the balance of the claim, \$14,539. Plaintiff appeals contending that the judgment should have been entered for the full amount of its claim.

Counsel for defendant say "The defendant takes the position that the statute of limitations bars the collection of interest on a judgment which has been paid, where the interest did not accrue within five years preceding the filing of the suit. The suit was filed on December 29, 1933. The court adopted the defendant's view

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and held that interest on the judgment accruing prior to December 29, 1928 was barred by the statute of limitations." And continuing counsel says: "The plaintiff advances the argument that the interest accrued from the date of the entry of the judgment on July 26, 1927 and was due on November 19, 1930 when the judgment was paid; that the statute of limitations did not bar the claim until five years from the date of the payment of the judgment." When the judgment was paid November 19, 1930, the interest on the judgment was also due and payable at that time and the instant case having been brought December 29, 1933, a little more than 3 years after the payment of the judgment, we hold it was not barred by the 5 year Statute of Limitations. Tracey v. Shanley, 311 Ill. App. 529; Bogden v. Milauckas, 313 Ill. App. 311; People ex rel. 1111 N. La Salle Corp. v. City of Chicago, 316 Ill. App. 66.

Section 3 of the Interest Act (Ill. Rev. Stat. 1943, ch. 74) provides that judgment "shall draw interest at the rate of five (5) per centum per annum from the date of the same until satisfied." And section 7 of Chapter 77, Ill. Rev. Stat. 1943, which has to do with judgments, decrees and executions, provides: "Every execution issued upon a judgment shall direct the collection of interest thereon, from the date of the recovery of the judgment until the same is paid, at the rate of five per centum per annum."

The judgment of the Circuit court of Cook county is reversed and the cause remanded with directions to enter judgment for the amount of plaintiff's claim.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and Matchett, J. concur.

43060

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

HERMAN MUELLER,
Plaintiff in Error.

ERROR TO

COUNTY COURT,

COOK COUNTY.

323 I.A. 655

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed against defendant charging him with the violation of §24 of the Medical Practice Act (Ill. Rev. Stat. 1943, ch. 91.) Defendant filed a written motion to quash the information which was overruled and December 14, 1943, defendant entered a plea of not guilty, there was a jury trial, and at the close of the evidence an order was entered that the jury "after hearing all the evidence adduced and the arguments of counsel, and instruction from the Court, retire to consider of their said Verdict. And it is ordered by the Court, that the Jury having arrived at a verdict shall sign and seal said Verdict and return into Court at the hour of 10:00 A.M. December 15th, A. D. 1943." On the next day, December 16, the jury returned their verdict: "We, the jury find the defendant guilty," signed by each member of the jury. On the same day the court entered the following order: "This day, again come the parties to this cause, by their respective Attorneys, and the Jury heretofore empanelled in said cause bring in their sealed verdict.

"Whereupon said defendant objects to the sealed Verdict. Thereupon said Verdict is opened in open Court and said Jury bring in their verdict and say

"We, the jury find the Defendant Guilty."

"Thereupon said Defendant moves the Court for a new trial of said cause, which said motion is hereby entered and the further hearing continued to December 28th, 1943."

2.

On December 30 an order was entered denying defendant's motion for a new trial and it was ordered and adjudged that defendant pay a fine of \$200 and \$18 costs. Defendant prosecutes this writ of error.

Counsel for defendant contends that the court should have quashed each count of the information. The information was in four counts; in the first count it was charged that defendant on the 19th day of March, 1943, in Chicago, not then possessing a valid license to practice the treatment of human ailments, did on that day diagnose the supposed ailment of Gustav Klein as gall bladder. The second count contains substantially the same allegations except that it went more into detail as to what defendant did in treating Klein by the use of electric machine, etc. The third count is similar to the second except as to the application of electricity, etc., and the fourth count made similar allegations except that it charged that defendant unlawfully maintained an office at 340 North Central avenue, Chicago, for the exmainaion and treatment of persons afflicted or supposed to be afflicted with any ailment.

The argument of counsel for defendant is that the information is insufficient and his motion to quash should have been sustained. We think this contention cannot be sustained. The information charges that defendant, without having a license, treated Klein for an alleged human ailment. This was sufficient. People v. DeYoung, 309 Ill. App. 525, affirmed 378 Ill. 256; People v. Shaver, 367 Ill. 339; People v. Spencer, 369 Ill. 57; People v. Paderewski, 373 Ill. 197; People v. Kabana, 383 Ill. 284; People v. Kabana, Appellate Court First District, #42862, opinion filed February 28, 1944.

Gustav Klein testified that he was an inspector in the Department of Registration and Education and had been so employed for about three and one-half years. That on March 18, 1943, he made an inspection of defendant's office at 340 North Central avenue,

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Chicago, and saw defendant in the office which was on the second floor; that he rapped on the door and walked in and defendant said: "I am Dr. Mueller;" that there were various electrical machines and a treatment table in the room. That defendant asked the witness who sent him and the reply was, his brother-in-law. Defendant then asked him to come into the next room, which he did, and was told by defendant to take off his coat; that defendant applied his left hand to Klein's chest and tapped the back of his left hand with his right hand; that defendant applied his hands to the witness's groin and over each knee and said: "Young man, you have a bad case of gall bladder trouble, but that's nothing to worry about." The witness then detailed further what was done and said that he paid defendant \$1.75 and was told to come back the next day which he did, at about 3 o'clock in the afternoon. At that time there was a lady in the office, apparently a receptionist. Defendant told the witness to get on the table and lie down on his back. He was handed two electric rods and applied electric plates to both knees for about 20 minutes. He was then told to turn over on his stomach which he did and he was further treated electrically. That when he got off the table defendant gave him a pill and a glass of water which he took. That defendant said the witness's blood pressure showed 112. He was in the office on this day about an hour and paid defendant \$3.

On cross-examination he testified that there was nothing wrong with him when he went into the office; that he did not tell defendant at the time that he was suffering from a backache.

Defendant, called on his own behalf, denied that he had seen Klein on March 18 but that Klein was at the office on the following day. He denied that he had told Klein that he was suffering from gall bladder; he also denied the application of the electrical treatment as testified to by Klein, and did not prescribe any electrical

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treatment for him. That he did not give Klein a pill to take. He testified that he maintained an office at 340 North Central avenue, where he had a "blood pressure machine" but he did not use it on Klein. He denied having treated Klein at all.

On cross-examination he testified: "When a fellow comes around once in a while and wants to find out what is wrong with his back or the knees we have a regular man that he has to see and after he has concluded his diagnosis" we ask him to leave a sample of his urine so we can make a urinalysis. And that this is done by a physician whom defendant consults; that several physicians refer patients to defendant; that he received the \$4.75 from Klein which was paid to the laboratory for the urinalysis.

Ann Pobanz, called by defendant, testified that she was employed by Mueller on the 18th and 19th of March; that Klein was in the office on the 19th and that she did not hear defendant tell him he was suffering from gall bladder trouble. She also denied that Klein was treated electrically as he had testified or that defendant had given Klein a pill. She corroborated the defendant as to the urinalysis.

Counsel for defendant contends that the court erred in directing a sealed verdict and in permitting the jury to separate without defendant's consent and that the court erred in denying defendant the right to poll the jury. The order of December 14, 1943, from which we have above quoted, recites that after the jury heard all the evidence and arguments of counsel and instructions from the court they retired to consider of their verdict, and it was ordered that the jury, having arrived at their verdict, should sign and seal and return the verdict into court the next morning at 10 o'clock and the verdict of the jury appears in the record, having been returned December 15th. The record fails to disclose that counsel for defendant made any objection to the jury returning a sealed verdict and there is nothing to show that defendant did

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not consent to the order. In these circumstances defendant is not in a position to complain. People v. Meyer, 331 Ill. 608. In that case, Meyer was tried on an indictment for murder. He was convicted of manslaughter. It was contended that the court erred in not keeping the jury together during the trial, in charge of a sworn officer, but permitted them to separate during the recess of the court and at night. After making this statement the court said: "The record does not show that the plaintiff in error objected to the separation of the jury." The court then discussed some authorities and held that where the record does not show defendant objected to the separation of the jury during the progress of the trial and there is nothing to show that he did, the presumption will be indulged that he did consent.

For the same reason we are further of opinion that defendant cannot complain that he was deprived of his right to poll the jury. As stated, no objection was made to the jury returning a sealed verdict and there is nothing to show that the jury was or was not polled.

We are further of opinion that the contention of defendant that the verdict is contrary to the law and to the evidence and that defendant was not proven guilty beyond a reasonable doubt cannot be sustained. We have above set forth substantially all the evidence and think it clear that the jury were warranted in finding defendant was guilty beyond all reasonable doubt.

The judgment of the County court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P.J., and Matchett, J., concur.

Abstract

323 I.A. 656

Gen. No. 9977

Agenda No. 17

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM A. D. 1944

1413

AGNES M. BECKER,
Appellee,
v.
FRANK KETTER,
Appellant.

Appeal from
County Court of
Lake County

Dove. P. J.:

On November 27, 1942, Agnes M. Becker, appellee, obtained a judgment by confession against Frank Ketter, appellant, in the county court of Lake County, on account of rent for a garage building in the City of Highland Park, for the months of February, March, April, May and up to June 15, 1942, at \$175.00 per month, less \$90.00 received from a sub lessee, plus \$75.00 attorney's fee, the judgment aggregating \$772.50. On December 31, 1943 the defendant filed his verified motion to open the judgment and for leave to defend. The plaintiff filed a counter motion on the merits, and upon the hearing of the motion, without any testimony, the trial court entered an order denying the motion as to all of the judgment, except as to the item of \$175.00 as rent for the month of February, 1942, and as to that item opened the judgment, with leave to defend, and placed the cause on the trial calendar. The defendant filed his notice of appeal and served the plaintiff with a copy thereof and proof of service duly filed. Therefor the trial court defaulted appellee for

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failure to appear, and reduced the judgment by the amount of \$175.00.

Appellee concedes that the rent for February, 1942 should not have been included in the judgment and insists that it was so included inadvertantly. Appellant's motion alleges he had no knowledge of the judgment prior to the institution of garnishment proceedings thereon a few days prior to the filing of his motion. This is not disputed, and no question of his diligence is involved.

A copy of the lease upon which the judgment is predicated, attached to the original complaint as an exhibit, and dated June 6, 1939, discloses that appellee leased the premises to Rocco Coscarelli for the term commencing June 15, 1939 and ending June 14, 1942, inclusive, at a monthly rental of \$165.00 per month to December 14, 1939, and \$175.00 per month thereafter, the rent payable monthly in advance on the 15th of each month. The lease contains covenants that the lessee received the premises in good order and repair, that he shall so keep the same, and return them to the lessor upon termination of the lease in the same condition, loss by fire and reasonable wear and tear excepted. Appellant became the assignee of the lease, with appellee's consent, on July 1, 1940. By appellant's acceptance of the assignment he assumed and agreed to perform and keep all the covenants of the lessee.

The motion to open the judgment alleges that the former lessee had paid the rent to and including July 14, 1940; that on July 9, 1940, appellant paid appellee \$175.00 for the rent commencing July 15, 1940 to and including August 14, 1940; and that thereafter he paid appellee the sum of \$175.00 for the current rent of each and every month up to and including the payments made on January 10, 1942, by check No. 403 in the amount of \$175.00,

which paid the rent from January 15, 1942 to February 15, 1942, and by check No. 421 dated February 4, 1942 which paid the rent to March 15, 1942. The motion further alleges appellant's complaint to appellee of the bad state of repair of the walls, the roof, and the heating plant, due to their age and deterioration, her refusal to make any repairs, and the making of such repairs by appellant as were possible without extensive structural work; that appellant had a sub-tenant paying \$75.00 per month for part of the building, who complained of the bad state of repair, and whom he released from his contract on March 15, 1942, (the date when the motion alleges appellant vacated the premises), and that thereafter appellee reduced the sub-tenant's rent to \$30.00 per month. Paragraph (f) of the motion alleges: "That the plaintiff advised the defendant that she intended to sell the premises and would make no repairs to the premises and wanted defendant to consent to vacate the premises upon plaintiff's securing a purchaser, and that defendant agreed to and did surrender the premises on to-wit the 15th day of March, A.D. 1942." The motion further alleges that appellant is not indebted to appellee in any sum whatsoever, and prays that the judgment be opened, with leave to file an answer, and for a trial by jury. The two checks above mentioned, bearing appellee's endorsement, and paid by the bank on which they were drawn, were attached as exhibits to the motion. On the reverse side are the words: "Garage Rent January 1942" on one of them, and the words: "Garage February 1942" on the other.

The counter affidavit alleges the lease and its assignment; that appellant paid the rent from July 1, 1940 for the month of July, on or about July 9th, and not for the period from July 15th to August 15th, 1940; and denies that appellant

made monthly payments of rent from the 15th day of each month to the 15th day of the following month; alleges that the premises were in good condition at the time of the execution of the lease, and were so received by the lessee and by appellant; and that it was the duty of appellant to make all repairs; denies the allegations of paragraph (f) of the motion, or any agreement to have the premises surrendered by her; and alleges that in the first part of January, 1942, appellant told her, by telephone that the government was releasing all automobile releases, and that he would not pay any more rent, to which replied that appellant was not running an automobile business, but a taxicab business, and that she would hold him to his lease; and that appellant vacated the premises in January, 1942.

The words on the back of the two checks mentioned do not destroy the effect of the allegation that the checks were in payment of the rent up to the 15th of the following month. That was a matter to be determined by proof. Regardless of any question as to repairs and whose duty it was to make them, the allegation that appellant vacated the premises on March 15, 1942, by agreement with appellee, and the allegation as to the payment of rent each month up to the 15th of the following month, and up to and including the date of the alleged vacation of the premises by agreement with appellee, make a prima facie defense on the merits to the whole of appellee's demand. These allegations sufficiently comply with the requirements of Supreme Court Rules 26 and 15 (Ill. Rev. Stat. 1943, chap. 110, pars. 259.26 and 259.15) and are not mere conclusions, as claimed by appellee. (Moore v. Monarch Distributing Co., 309 Ill. App. 339.) Furthermore, appellee having failed to question the sufficiency of the motion in the trial court is precluded from doing so on appeal. (Kent v. Rhomberg, 288 Ill. App. 328.)

Rule 26, above mentioned, provides that if the motion and affidavit disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set such motion down for a hearing, that the plaintiff may file counter affidavits, and that if, at the hearing upon such motion, it shall appear that the defendant has a defense on the merits to the whole or a part of the plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall then sustain the motion either as to the whole of the judgment or as to such part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial, and the complaint, motion and affidavit, and counter affidavits shall constitute the pleadings unless the parties, or either of them, shall ask leave to file further pleadings. The rule manifestly limits the scope of the hearing on the motion to the questions of whether it discloses a prima facie defense and diligence of the defendant in presenting it. By the terms of the rule, if these matters appear on the hearing, as they do in this case, the court is required to grant the motion and set the cause down for trial. The cause should have been tried on the pleadings and not on the affidavit or affidavits, and it was error to deny the motion to open up the judgment as a whole.

See 323 Ill. App. 323, 325, 326,
(Kolmar v. Moore, 55 N.E. (2d) 524, 525 and cases there cited;)

Walrus Manufacturing Co. vs. Wilcox, 303 Ill. App. 286; Stranak v. Tomasovic, 309 Ill. ^{App.} 177.) Analagous to the holding in those cases, is the decision in Diversey Liquidating Corporation v. Neunkirchen, 370 Ill. 523, under an application for summary judgment. The purpose of Rule 26 was to clarify and simplify the established practice and not to change it. (Walrus Manufacturing Company v. Wilcox, 303 Ill. App. 286.)

The order of the trial court is reversed and the cause is remanded with directions to proceed in accordance with the views herein expressed.

Reversed and remanded with directions.

323 I.A. 656²

Abstract

Gen. No. 9978

Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A.D. 1944.

1423

| | | | |
|--------------|------------|---|---------------|
| EDNA MAY, | Appellee, |) | Appeal from |
| vs. | |) | Circuit Court |
| E. G. MARTY, | Appellant, |) | Bureau County |

Dove, P. J. :

Appellee recovered a judgment for \$1500.00 against appellant in the circuit court of Bureau County for damages on account of alleged indecent assault, and upon an appeal to the Supreme Court of this state on alleged constitutional grounds, the cause was certified to this court because no constitutional question is involved.

The record discloses that

^ Appellant is a chiropractor, and has been practicing his profession at the City of Spring Valley since 1922. He was 47 years old at the time of the trial, married, and the father of two children living at home. Appellee is the wife of a farmer, residing about ten miles northwest of Spring Valley. She was 27 years of age and had no children. In March, 1943, she and her husband contracted with and paid appellant for X-rays and treatments for each of them covering certain periods. The treatments continued up to August 7,

1943. On that evening the acts complained of are alleged to have taken place at appellant's office.

The three original counts of the complaint charged that appellant, with force and arms, beat, bruised, crushed, injured, and ill treated appellee, and tore her clothes. After the jury was empanelled and sworn, but before any testimony was heard, appellee was permitted, over appellant's objection and motion to withdraw a juror and declare a mistrial, to file an additional count charging that the defendant, with force, did willfully, unlawfully, wantonly, and against the will and consent of the plaintiff, and without any fault on her part, assault the plaintiff, and then and there indecently touched, laid hands and seized her in a lustful, lascivious, sexual and indecent manner, (with details of the alleged assault, not necessary to be repeated here), and by making indecent suggestions and statements to her; and also then and there forcibly shook and pulled about the plaintiff, and tore her dress in furtherance of his indecent conduct and acts and sexual desire. Each of the second, third and additional counts alledge physical and mental suffering and permanent injury. Appellant's claim that the trial court erred and abused its discretion in permitting the additional count to be filed, on the ground that he was thereby surprised and deprived of making a proper defense, requires no consideration, inasmuch as the judgment must be reversed and the cause remanded for other reasons.

The only two witnesses to the acts complained of were appellee and appellant. She testified directly and positively to each of such acts, and to her physical and mental suffering as a result thereof, and her testimony was sufficient to establish a prima facie case. Appellant specifically in detail

denied each and all of such acts, and testified that there was no improper conduct on his part. The evidence discloses that the office of appellant was formerly his residence and faces north with a porch across the front. The entrance to the reception room is on the east end of the porch, and south of the reception room is the adjusting room, which opens into an east and west hall, with a ladies' rest room north of the west end of the hall, and a mens' rest room south of the same end of the hall. Appellee's husband came with her to appellant's office on the night in controversy about 8:30 P.M. She received a treatment in the adjusting room in his presence, after which he left the office for some time, on another matter. Appellee testified that the first acts complained of took place in the ladies' rest room, where she had retired on a cot, at appellant's direction, to relax after her treatment, and while her husband was away from the office; and that the other acts charged occurred thereafter in the adjusting room, while her husband was in the reception room, to which he had meanwhile returned. The testimony of these two witnesses as to whether the ladies' rest room was dark or lighted at the time of the alleged acts there, is in direct conflict. Appellee testified that she and her husband left appellant's office at about 25 minutes after 9:00 or 9:30 o'clock P.M. and that she told her husband of the occurrences when they were about half way home.

A witness produced by appellant testified that he took a treatment at appellant's office on the night in controversy, and occupied the mens' rest room, fixing the time of his being at the office as extending from about 8:30 or 8:45 P.M. to until 9:30 or 10:00 P.M. He testified that while he was resting he was from 30 to 50 feet from the ladies' rest room; that while he was at the office he did not hear appellant ask anyone a suggestive question to which appellee testified, and heard no unusual noises; and that he did not think he saw ap-

pellee or her husband there that night, and could not say whether he saw anybody waiting or leaving when he arrived.

Appellee's testimony, standing alone, and being sufficient to establish a prima facie case, there was no error in refusing to direct a verdict for appellant, either at the close of the testimony for appellee, or at the close of all the testimony. (Todd v. S. S. Kresge Co., 384 Ill. 524, 527; Bartolucci v. Falletti, 382 Ill. 168, 173; Merlo v. Public Service Co. of Northern Illinois, 381 Ill. 300, 311.).

What actually transpired between the parties was a question of fact between the plaintiff and the defendant, as they were the only witnesses to the actual transactions. The trial judge and the jury saw and heard them testify and were in a better position to judge of their credibility and the weight to be accorded their testimony than a court of review. Those matters were questions of fact for the jury, and if the jury had been properly instructed, we do not think we would be justified in holding that the verdict is against the manifest weight of the evidence, as contended by appellant. The evidence was conflicting with the positive testimony of appellee being expressly denied in detail by appellant, and in such a case it is well settled that the jury shall be accurately instructed. (Illinois Central Railroad Co. v. Smiesni, 104 Ill. App. 194; Balenovic v. Ansick, 181 Ill. ^{app.} 660.)

Appellant claims that the trial court committed reversible error in giving several instructions at the instance of appellee. The criticism of the first of such given instructions is that it told the jury that if they found from the evidence, that the evidence preponderated in favor of the plaintiff, although the preponderance is slight, it will be sufficient

for the jury to find the issues for the plaintiff. The giving of such instructions employing the word "slight" or "clear" has been repeatedly held to be error. (Malloy v. Chicago Rapid Transit Co., 335 Ill. 164, 171; Wolczek v. Public Service Company of Northern Illinois, 342 Ill. 482, 495.) In Teter v. Spooner, 305 Ill. 198, distinguished in the Malloy case, it was held that the error was not sufficient to reverse the judgment, because the verdict could not have been otherwise on the evidence, but that is not the situation in the case at bar, where the evidence is in direct conflict.

The 2nd, 8th and 9th instructions improperly referred the jury to the complaint for appellee's charges against appellant, without any statement in any of the instructions of the contents of such charges as stated in the complaint. It is not proper for the complaint to go to the jury, and instructions should not refer the jury to it to ascertain the charges or the damages claimed. (Laughlin v. Hopkinson, 292 Ill. 80, 85; Krieger v. Aurora, Elgin and Chicago Railroad Co., 242 Ill. 544, 548; Baker & Reddick v. Summers, 201 Ill. 52, 56.)

The 4th, 5th, 8th and 9th instructions, although couched in varying language, were practically identical on the law of damages based on appellee's pain and suffering. There is no justification for repetition of the same instruction, even though they are correct as a matter of law. (Thompson v. Hughes, 286 Ill. 128, 136.) This is particularly true where the case is close on the facts, and the evidence is such as to touch the sympathy, or the passion or prejudice of the jurors.

The third instruction told the jury that the unlawful touching of one person by another constitutes an assault and

battery under the law; that the degree of violence used in such unlawful touching is immaterial; and that if the jury believed from the greater weight of the evidence that the defendant did touch or place his hands or any part of his person on the plaintiff in a wrongful or unlawful manner, "then you should find the defendant guilty and assess such damages in favor of the plaintiff against the defendant as you may believe under the instructions of the court, and by the greater weight of the evidence, should be allowed to the plaintiff." This instruction embraced punitive damages, although not expressly mentioned by that term, and erroneously invaded the province of the jury in telling them that they should allow such damages if they found the facts to be as stated, instead of telling them they might allow, or were at liberty to allow such damages. (Consolidated Coal Company v. Haenni, 146 Ill. 614, 628; Wabash, St. Louis and Pacific Railway Co. v. Rector, 104 Ill. 296, 303.) The instruction in effect directs a verdict and could not be cured by any other given instruction.

The 4th and 9th instructions did not limit the damages recoverable to appellee's pain and suffering from the alleged injuries inflicted by appellant, but covered pain and suffering from her physical injuries in general. There is in the record testimony that she had fallen down stairs, and had pain in her shoulders and side, and that her nose and one ankle had been injured from other causes. The instructions were erroneous in this respect. (Garvey v. Chicago Railways Co., 339 Ill. 276. 289; Illinois Central Railroad Company v. Johnson, 221 Ill. 42, 49.)

The 28th instruction, in telling the jury that if they believed from the evidence that the defendant assaulted the plaintiff, as testified to by her, then they were justified in finding the defendant guilty, improperly singled out and called

attention to the testimony of the plaintiff. (New York Central Railroad Co. v. Kinsella, 324 Ill. 339, 345; Chicago and Eastern Illinois Railroad Co. v. Burridge, 211 Ill. 9, 13. Walsh v. Chicago Railways Co., 294 Ill. 586, 595 - 596.)

The vice of the 5th and 6th instructions on the question of punitive damages is that they mention only indecent assault, and omit any reference to the defense that the alleged assaults were made only in making professional adjustments with no more than necessary force. The jury might well have assumed that the court believed that the assaults, if any, were indecent. The jury should have been left free to determine the character of the alleged assaults. (Collins v. Waters, 54 Ill. 485, 488, 489; Nyman v. Manufacturers and Merchants Life Ass'n. 262 Ill. 300, 308.)

Thirty instructions were given at the instance of appellee, and fourteen at the instance of appellant. The practice of giving a large number of instructions has often been condemned as likely to confuse rather than to enlighten the jury. The issues in this case were not complicated and the testimony was not voluminous. The applicable law could have been covered by a few instructions.

Over objection, appellee was permitted to testify as to appellant's financial worth by hearsay evidence of what her lawyer told her that someone else had told him. The trial court permitted appellant to be cross-examined, over objection, on the subject of his financial worth which was entirely outside the scope of his direct examination. This was improper.

It is unnecessary to discuss other grounds urged for reversal. Because of the errors mentioned, the judgment is reversed and the cause is remanded to the circuit court for a new trial.

Reversed and remanded.

OK
Wells

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1432

Abstract

323 I.A. 657

GEN. NO. 9946

AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1944

| | | |
|------------------|---|-------------------------|
| EDWARD A. ELLIS, |) | |
| |) | |
| APPELLANT, |) | |
| |) | |
| VS. | : | APPEAL FROM THE CIRCUIT |
| |) | |
| RALPH KEELING, |) | COURT OF LAKE COUNTY. |
| |) | |
| APPELLEE. |) | |

HUFFMAN, J.

This is an action by appellant for possession of a residence property located in Libertyville, Lake county. Appellant rented or leased the house to appellee on November 1, 1940, at a rental of \$32.50 per month. This appears to have been the monthly rental on March 1, 1942, when the rent control act became effective. Appellant demanded the monthly rent be increased to \$35.00. Appellee refused. Appellant began a series of correspondence with the local administrator of the O.P.A. regarding eviction of appellee. Subsequently this suit for possession was instituted in the Circuit Court of

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Lake county. It is predicated upon a claim by appellant that he seeks possession of the house for immediate use and occupancy as a dwelling for himself and family.

While it does not appear in the record under what section of the rent regulation appellant was proceeding, the attorney for the O.P.A. in his cross-examination of appellant, stated to the trial court that appellant's complaint and testimony were insufficient and did not comply nor satisfy the regulations of the O.P.A. regarding eviction upon the ground herein involved. The attorney refers to regulation provision under Sec. 6A, and to paragraph 9 of regulation under Sec. 6A6. We find no further information in regard to the above designated regulations, except a general reference thereto by the government attorney in his testimony as a witness. Here, he refers to notice DD 108, which was appellant's notice to the O.P.A. of the commencement of this suit. The government attorney in his testimony denies that any notice was sent out by the office of the O.P.A. to either the appellant or appellee pursuant to appellant's notice DD 108. The court dismissed the complaint, and appellant brings this appeal.

The action of the trial court was based upon a finding of fact that appellant was not in good faith in endeavoring to obtain possession of the premises

for occupancy for his own use. Although it does not appear from the record, we assume the proceeding was under rent regulation No. 6 (b) (2). Under this section, it would appear that when a certificate of removal is issued by the O.P.A., the intent thereof would be to authorize the applicant to whom the certificate issued, to pursue his remedy for removal in accordance with local law, at the expiration of three months after date of issuance of the certificate, and that a notice required by local law might be given prior to the expiration of the three months period, since it may run concurrently. This, as we understand it, is according to interpretation made of rent regulation 6 (b) (2) --V (Issued Nov. 30, 1942). No certificate of removal was issued to appellant by the O.P.A. in this case.

We find no reversible error in the record. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

THE SECRETARY OF THE ARMY AND NAVAL DEPARTMENT
WASHINGTON, D. C.
JANUARY 10, 1911
SIR:
I have the honor to acknowledge the receipt of your letter of the 7th inst. in relation to the proposed
amendment to the regulations governing the appointment of officers to the grade of Captain in the
United States Army. The proposed amendment is as follows:
"The Secretary of the Army and Naval Department shall have the honor to recommend to the President
the appointment of officers to the grade of Captain in the United States Army, and the Secretary of the
Army and Naval Department shall have the honor to recommend to the President the appointment of officers to the
grade of Captain in the United States Navy."
I am, Sir, very respectfully,
Yours very truly,
J. D. R. [Signature]

Abstract

323 I.A. 657

GEN. NO. 9959

AGENDA NO. 9

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1944

FLORENCE SMITH, CONSERVATOR
OF LESTER SMITH, AN INCOM-
PETENT PERSON,

APPELLEE,

vs.

MILK WAGON DRIVERS' UNION,
LOCAL No. 753, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, STABLEMEN AND
HELPERS OF AMERICA, ET AL.,

APPELLANTS.

APPEAL FROM THE CIRCUIT
COURT OF DuPAGE COUNTY.

HUFFMAN, J.

This is an action to enforce a contract between the member and the defendant union, and to recover sick and disability benefits thereunder. Lester Smith became a member on or about January 1, 1924. At that time the by-laws effective January 1, 1922, were in force. These by-laws remained in force to and including December 31, 1935. In March, 1925, the said member was injured while engaged in the performance of his duties as employee of the Borden Dairy Company. He received benefits from

appellant union pursuant to the by-laws of 1922. Upon his recovery, he returned to work for the Borden Dairy Company, and continued in its employ until about November, 1928, when due to mental trouble he was rendered disabled and unfit to work. He was committed to the hospital for the insane at Elgin, in January, 1929, and has remained a patient there ever since. Appellant union made disability and sick benefit payments to the member's wife and children to August 1, 1936, when it discontinued payment of benefits and refused to resume same.

Appellee, the wife, instituted this suit as conservator for the member. The arrearages as set up in disability payments are based upon those as fixed by the by-laws of 1922. On January 1, 1936, the by-laws in regard to sickness and disability benefits were changed. However, the member being in good standing, and becoming disabled while the 1922 by-laws were in existence, had acquired a vested right therein. *Fichter v. Milk Wagon Drivers' Union, Local 753*, 382 Ill. 91. Therefore, appellant's contention that the amended by-laws of 1936 control is of no further moment.

Appellants complain that a representative suit such as exists here should not prevail; that Local 753 of the Milk Wagon Drivers' Union is an unincorporated voluntary association or organization, and that all of the members have an interest in the litigation, which interest may not be identical. This suit is instituted against the Milk

Appellant's motion for summary judgment is denied. The court finds that there is a genuine issue of material fact as to whether or not the defendant acted reasonably in the circumstances. The court also finds that the plaintiff has established that the defendant's conduct was negligent. The court therefore grants summary judgment in favor of the plaintiff.

The court also finds that the defendant's conduct was negligent. The court therefore grants summary judgment in favor of the plaintiff. The court also finds that the defendant's conduct was negligent. The court therefore grants summary judgment in favor of the plaintiff.

The court also finds that the defendant's conduct was negligent. The court therefore grants summary judgment in favor of the plaintiff. The court also finds that the defendant's conduct was negligent. The court therefore grants summary judgment in favor of the plaintiff.

Wagon Drivers' Union, Local 753, the President and Secretary thereof individually and as such officers, the Trustees thereof individually and as such officers, and the Steward thereof individually and as such officer.

The complaint sets out that the defendant union consists of approximately 5,000 members, whose names and addresses are unknown to the plaintiff and that it is impractical to endeavor to bring all of the members into court as defendants, because any attempt to make them parties defendant to the suit would subject the proceedings to a condition of perpetual abatement due to a constant change in membership, and other causes.

We are of the opinion the allegations of the complaint in this respect disclose a case so extraordinary and exceptional in character as to demonstrate that it is practically impossible to make all parties in interest parties to the suit; and further, it appears that those who are made parties to the suit have the same interest in the subject matter of the litigation as those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons. Under such circumstances, this would appear to be sufficient. *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 423, 424.

The question of equitable jurisdiction is raised by appellants. This question was not raised in the trial court and under such circumstances, where it appears the case is one not wholly foreign to chancery jurisdiction,

such question cannot be raised on appeal. Phillips v. Benfield, 249 Ill. 139, 141.

Appellants further object to the action of the court in granting a money judgment. It appears from the complaint that the plaintiff is seeking to have continued in force an alleged contractual relationship between the member and the union. It is alleged that under the by-laws of 1922, benefits were due, and that none had been paid since 1936. The court was asked to determine the liability of the defendant union under the by-laws, with respect to plaintiff's claim, to decree payment of the sum found due, and for such other and further relief as should seem meet and proper. Two similar suits have recently come under review of the Appellate Court of the First District. The contention of appellants is not sustained by those cases. Olinski v. Milk Wagon Drivers' Union Local 753, 320 Ill. App. 487; Jansen v. Milk Wagon Drivers' Union Local 753, 320 Ill. App. 435.

Finding no error in the record, the decree is affirmed.

Decree affirmed.



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